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In the

United States Court of Appeals

For the Seventh Circuit

No. 11924

RAILWAY EXPRESS AGENCY, INC.,
Petitioner,
vs.
RAILROAD RETIREMENT BOARD,
Respondent.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, THE ORDER OF RAILROAD TELEGRAPHERS, RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenors.

Petition for Review of Order of the Railroad Retirement Board.

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APPENDIX TO PETITIONER'S BRIEF.

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Chicago 7, Illinois,
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In the

United States Court of Appeals

For the Seventh Circuit

No. 11924

RAILWAY EXPRESS AGENCY, INC., *Petitioner,* *vs.* **RAILROAD RETIREMENT BOARD** *Respondent.* **BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, THE ORDER OF RAILROAD TELEGRAPHERS, RAILWAY LABOR EXECUTIVES' ASSOCIATION,** *Intervenors.*	Petition for Review of Railroad Retirement Board Order No. 56-235, Dated August 29, 1956.

APPENDIX TO PETITIONER'S BRIEF

STATEMENT PURSUANT TO RULE 16(b).

The matter now under appeal is the culmination of almost twenty years of administrative proceedings before the Railroad Retirement Board (hereinafter referred to as the Board). This series of administrative proceedings was commenced by the Board in 1937, for the purpose of determining whether or not some 17,000 commission agents of Railway Express Agency, Incorporated, and their assistants, were in the status of "employees" under the provisions of the Railroad Retirement Act (45 U. S. C. 228, et seq.). Said commission agents fell into several classes, and a large part of the proceedings deals with the problem of defining the various classes of commission agents. However, the two largest and most important classes of commission agents involved were those ultimately defined as "joint railroad-express agents" and those ultimately defined as "merchant agents."

The scope of the original inquiry was later enlarged to include the question of whether the said commission agents also had the status of "employees" under the Railroad Unemployment Insurance Act (45 U. S. C. 351, et seq.). As the inquiry further progressed, Railway Express Agency, Incorporated (hereinafter referred to as the Express Agency) abandoned its contentions, for the purposes of these proceedings, as to commission agents defined as joint railroad-express agents. In the last stages of the administrative proceedings, and at this time, the only issue involved is whether said "merchant agents and their assistants" are "employees" of the Express Agency under the provisions of the Railroad Retirement and the Railroad Unemployment Insurance Acts:

A chronological outline of the proceedings involved herein is as follows:

October 28, 1937: The Board issued an order directing that hearing be held to determine the question:

> "* * * are persons performing duties for the Railway Express Agency, in return for compensation on a commission basis, and who devote substantial portions of their time to other occupations, particularly railroad service, to be classified as employees under the Railroad Retirement Acts of 1935 and 1937? * * *"

This proceeding was identified by the Board as Jurisdictional Docket No. 2.

December 15, 1937-March 19, 1938, incl.: Hearing was held in Jurisdictional Docket No. 2 before the Board's General Counsel Lester P. Schoene, appointed by the Board as Examiner. The Express Agency, the Order of Railroad Telegraphers (hereinafter referred to as the Telegraphers) and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the Clerks) all participated in the hearing. Oral and documentary evidence was taken. Briefs were filed and oral argument heard. On March 19, 1938, Examiner Schoene submitted his report and recommendations to the Board.

March 24, 1938: The Board adopted the Findings of Fact and Conclusions of Law of Examiner Schoene, and decided that commission agents defined as joint railroad-express agents and merchant agents of the Express Agency, and their assistants, were employees under the Railroad Retirement Acts of 1935 and 1937.

May 31, 1938: The Board issued an order reopening Jurisdictional Docket No. 2 for the taking of further evidence therein, and directing:

> "(3) That particular attention be directed to the presentation of more complete evidence regarding the status of merchant agents."

August 5, 1938-June 9, 1939, incl.: Further hearing was held before Examiner Lester P. Schoene. Briefs were filed, Examiner Schoene submitted a report, exceptions to said report were filed by the Express Agency and reply to exceptions filed by the Clerks and Telegraphers. Oral argument was had before the Board on June 9, 1939.

August 1, 1939: The Board adopted the Findings of Fact and Conclusions of Law of Examiner Schoene, and decided, with certain exceptions, that commission agents defined as joint railroad-express agents and merchant agents were employees under the Railroad Retirement and the Railroad Unemployment Insurance Acts.

November 23, 1943: The Express Agency filed formal demand upon the Board, under Section 5(c) of the Railroad Unemployment Insurance Act (45 U. S. C. 355(c)) for refund of contributions based upon the compensation received by its agents aforesaid and their assistants. In separate statutory proceedings not before the Board, the Express Agency also filed claim for refund of taxes paid by it pursuant to the Railroad Retirement Act upon the compensation received by its agents aforesaid and their assistants. (The Express Agency, thereafter, preserved its statutory rights to claim refunds by additional filings at various times.)

June 23, 1948: The Board issued an order:

> "Authorizing hearing to determine whether joint agents, merchant agents, branch agents and certain other individuals performing express work should be classified as employees under Railroad Unemployment Insurance Act, and whether Railway Express Agency, Incorporated, is entitled to refund of contributions based on compensation of such individuals. Reopening Jurisdictional Docket No. 2 and authorizing hearing to determine whether joint agents, merchant agents, branch agents, and certain other individuals performing express work should be classified as employees under Railroad Retirement Acts."

The proceedings had pursuant to said order were designated by the Board as Jurisdictional Docket 2-2A.

August 10, 1948-November 6, 1950, incl.: A series of hearings was held in Jurisdictional Docket 2-2A before Omer M. Funk, employed by the Board as an attorney in the office of its General Counsel and appointed as Examiner for said Docket 2-2A. Appearances were entered by the Express Agency, the Telegraphers, the Clerks and by two commission agents of the Express Agency. Oral and documentary evidence was taken.

On the first day of said series of hearings, the Express

Agency conceded that, for the purposes of this proceeding, "joint railroad-express agents and all full-time employees of railroads who handle express" are employees of the Express Agency within the meaning of the statutes involved.

May, 1951: Counsel for the Telegraphers, Leo J. Hassenauer, died. Thereafter, Lester P. Schoene represented the Telegraphers.

February 11, 1952-October 6, 1954, incl.: Briefs were filed; oral argument was had before Examiner Funk.

December 29, 1955-June 28, 1956, incl.: Examiner Funk submitted his report, findings of fact, conclusions of law and recommendations. The Express Agency filed exceptions and the Clerks and Telegraphers filed reply to exceptions. Oral argument was had before the Board.

August 29, 1956: The Board adopted the findings of fact and conclusions of law and reasons therefor of the Examiner and ruled that the said joint railroad-express agents and merchant agents of Express Agency, and their assistants, with certain exceptions, were employees of Express Agency under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

November 27, 1956: Express Agency filed with this Court petition for review of the Board's order of August 29, 1956.

December 11, 1956: This Court granted the Board an extension of sixty days in which to file the Record, and, on February 11, 1956, the Record was filed.

December 18, 1956: This Court granted the Clerks and Telegraphers leave to intervene, limited to the right to file Appendix and Brief but not to participate in oral argument.

February 19, 1957: This Court, on stipulation of the parties, granted the Express Agency an extension of time to May 13, 1957 in which to file its Appendix and Brief.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Railway Express Agency, Inc.,
Petitioner,
vs.
Railroad Retirement Board,
Respondent,
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes,
The Order of Railroad Telegraphers,
Railway Labor Executives' Association,
Intervenors.
No. 11924.

CERTIFICATION.

I, Mary B. Linkins, Secretary of the Railroad Retire
ment Board, do hereby certify that the attached 646 page
numbered 1 to 646 for the purpose of this certificatio
constitute a true copy of such portion of the record befor
the Board in the Matter of the Status under the Railroa
Retirement and Railroad Unemployment Insurance Act
of joint agents, merchant agents, branch agents and ce
tain other individuals performing express work and the d
mand of Railway Express Agency, Incorporated, for r
fund of contributions based on compensation of such ind
viduals, R. R. B. Jurisdictional Docket No. 2-2A, upo
which the decision complained of in this proceeding
based.

In Witness Whereof, I have hereunto set my hand a
affixed the Seal of said Railroad Retirement Board on th
7th day of February, 1957.

/s/ Mary B. Linkins,
Mary B. Linkins,
Secretary of the Railro
Retirement Board.

(Seal)

(The complete record of the proceedings before the Railroad Retirement Board comprises 4654 pages, and is contained in nine separate volumes. The foregoing certification of pages numbered 1 to 646 constitutes the certification of Volume I of the record before the Board. Each of the succeeding volumes, being Volumes II through IX inclusive, containing pages 647 through 4654 inclusive, is preceded by a like certification by the Secretary of the Railroad Retirement Board, covering the pages contained in each such volume.)

1 EXCERPTS FROM THE MINUTES OF THE MEETING OF THE RAILROAD RETIREMENT BOARD HELD OCTOBER 28, 1937 AT TEN-THIRTY O'CLOCK A.M.

The Chairman presented to the Board certain correspondence which had been had between the Chairman and Mr. A. M. Hartung, General Solicitor, Railway Express Agency, with reference to the furnishing of information on AA-2 forms regarding the amount of express commissions paid to applicants for annuities who claim service with the Railway Express Agency, or its predecessors. The correspondence showed that the Railway Express Agency takes the position that Commission Agents, who are at the same time engaged in other employment, in most cases employment as Station Agents for a Railroad Company, are not employees of the Railway Express Agency, but are "independent contractors."

Particular attention was directed to a letter addressed to the Chairman by Mr. Hartung, dated October 20, 1937, in which a request is made for a conference upon the subject. Upon motion by the Chairman, and unanimous vote of the members, the Board adopted the following:

Order: It is ordered and directed that;

(1) The General Counsel be, and he hereby is, au-

thorized and directed to hold a hearing, and to act as Examiner for the Board, at Washington, D. C., on the earliest date which can be arranged to meet the convenience of the General Counsel and other interested parties.

(2) Notice of such hearing shall be given to the Railway Express Agency, the Order of the Railway Telegraphers, the Interstate Commerce Commission, the National Mediation Board, and the Commissioner of Internal Revenue, and any other parties who may be found to have an interest in the proceedings, and each of such parties shall be offered an opportunity to present evidence and to make arguments before the General Counsel.

(3) The subject upon which such hearing shall be held shall be the following questions: Are persons performing duties for the Railway Express Agency, in return for compensation on a commission basis, and who devote substantial portions of their time to other occupations, particularly railroad service, to be classified as employees under the Railroad Retirement Acts of 1935 and 1937? Is the time devoted to the performance of such duties for the Railway Express Agency, or its predecessors, creditable as "service" toward annuities under said Acts?

2 (4) In preparation for, and in the conduct of, said hearing, the General Counsel shall be, and he hereby is, authorized to require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations. A record shall be kept of all evidence presented, orally or in writing, at said hearing. Evidence presented orally shall be under oath.

Upon conclusion of the evidence and arguments, the General Counsel shall formulate findings of fact and conclusions of law, which, together with the record of the proceedings, shall be transmitted to the Board for consideration and decision.

* * * * *

10 MR. PAUL GROSS, JR., a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hartung.

Q. Mr. Gross, will you state your name, the position you hold with the Railway Express Agency, and the location?

A. Mr. Paul Gross, Junior, General Auditor, Railway Express Agency, Chicago, Illinois.

Q. Will you state what experience you have had in the express business and, generally, your qualifications?

11 A. I have been in the service of the Railway Express Agency and its predecessor companies since July, 1902,—a period of about 35½ years, occupying various positions in the Operating Department and Traffic Department, and, since January, 1913, in the General Accounting Department. In the General Accounting Department of the Adams Express Company, American Railway Express Company and Railway Express Agency, I have occupied various positions, including Auditor of Agency Accounts, Philadelphia, Statistician in New York, Assistant to the Vice President in charge of Accounts, New York, and, since February, 1935, as General Auditor at Chicago. In my present position, among other matters, I have charge of the auditing of accounts rendered by agencies in the territory generally west of Pittsburgh, north of the Ohio and Missouri Rivers and west of the states of Kansas and Texas to the Pacific Coast. Within this territory, the Railway Express Agency has representation at 670 salaried express agencies, and 8,842 commission or fixed-allowance agencies, of which latter 8,078 are joint railroad and express agencies.

Q. In order that there may be no confusion about that statement, Mr. Gross, the 8,078 joint railroad and express agencies, are those in your territory?

A. That is correct.

Q. And do not represent the total number of the express company's operation?

A. That is correct. I testified to that in the territory over which I have jurisdiction.

Q. Will you please outline, in a general way, for informatory purposes largely, the manner in which the express transportation business of the United States has been handled, that is, by what companies and the succession of various companies from time to time?

A. Prior to July 1, 1918, the express transportation business, in the United States, was carried on by four principal express companies and at various times by some smaller and less important express companies. The four principal companies were the Adams Express Company, the American Express Company, the Southern Express Company, and Wells Fargo & Company Express. These companies operated under individual contracts or
12 agreements with railroad companies over whose lines
express traffic was to be transported and under varying conditions, particularly with respect to the compensation which the railroad company was to receive from the express company for the performance of that service. In 1918 the railroads of the United States, that is, the principal railroads, were operated under Government control under the Director General of Railroads. The Director General of Railroads refused to take over the contracts of the several express companies with the railroad companies or to negotiate an agreement with the individual express companies for the transportation of express matter on railroads under Government control and required the formation of one company with which he was willing to negotiate, to act as agent for the Director General in the conduct of the express business. Pursuant thereto, the American Railway Express Company was organized and be-

gan express operations on July 1st, 1918. It acquired the property used in the conduct of the express transportation business by the old express companies in exchange for stock issued by the American Railway Express Company, the issuance of which had been approved by the Director General. The American Railway Express Company did not take over the assets and liabilities of the old express companies, other than the property devoted to the conduct of the express business, but it did undertake to liquidate for account of the old express companies, and at their expense, certain assets and liabilities. The American Railway Express Company operated under Government control until February 29, 1920. From March 1, 1920, to August 31, 1920, the American Railway Express Company conducted its operations on the guarantee of the Federal Government in accordance with Section 209 of the Transportation Act of 1920. Effective September 1, 1920, the American Railway Express Company conducted the express transportation business operating under the so-called uniform contract for express operations over railroad lines. They continued operating under this contract until February 28, 1923. After February 28, 1923, namely, from March 1, 1923, until February 28, 1929, it conducted its operations under the so-called amended Uniform Contract for express operations over railroad lines. The Railway Express Agency, Incorporated, was formed and
13 began operations on March 1, 1929. The Railway Express Agency, Incorporated, under a standard agreement operates on all the principal lines in the United States except the Southern Railway and its affiliated lines, the express operations over which are conducted by another express company. The Railway Express Agency conducts its operations in all states of the United States, in the Dominion of Canada, the Hawaiian Islands, Alaska and Cuba.

Q. You have just referred to the standard operating agreement between the Railway Express Agency and the railroad companies. I hand you a document; is that the form of contract to which you referred?

A. That is the standard agreement so-called by the various railroads of the United States and the Railway Express Agency which became incorporated.

(A paper bound book of 31 pages and 8 additional pages of exhibits, on the front cover of which is the title: "Express Operations—Agreement between ______ and Railway Express Agency, Incorporated—Effective March 1, 1929" was marked for identification "Exhibit No. 1" and offered in evidence.)

* * * * *

14 Q. We were also asked to furnish General Rules of the Railway Express Agency. Will you please identify this document?

A. I submit as Exhibit No. 8 a copy of "General Rules and Instructions" issued by the Railway Express Agency.

(A paper bound book of 90 pages, entitled on front cover "Railway Express Agency (Incorporated) General Rules and Instructions Railway Express Agency New York, January 1, 1936" was marked for identification "Ex. No. 8" and offered in evidence.)

15 Q. I hand you, Mr. Gross, a paper which is headed "Railway Express Agency, Route Agent's Report" and on the right hand corner the number "95". Will you describe that, Mr. Gross, its purpose?

A. I submit as Exhibit No. 10 a blank form used by Railway Express Agency, incorporated, and bearing printed inscriptions, form "95", which is a form used by Route Agents in making audits of agencies or in making transfers as between individuals at agencies. The face of the form is a summarization of debits and credits found by the Route Agent at the agency. On the reverse side of the form spaces are provided for listing the financial paper on hand at the agency. The special instructions to the agent on this same side of the form is an agreement between the agent and the company as to the status of accounts which have been turned over to him at the agency. There is also an agreement between the agent and the company as to the rate of commission to be allowed the agency, separately, as for L.C.L. traffic and carload traffic, local traffic and interline traffic, that is, traffic handled by two or more express companies. The understanding of the agent is attested to by signing on this form, and he acknowledges also the receipt of cash and other items found at the agency at the time of transfer.

(Paper headed "Railway Express Agency Incorporated Route Agent's Reports" marked for identification "Exhibit No. 10" and offered in evidence.)

Q. That becomes Exhibit No. 10?

A. Yes, sir.

16 Q. I now show you "Application for Employment with Railway Express Agency." Will you please state whether that is the current form used for that purpose?

A. I submit as Exhibit No. 11 a blank form headed "Application for Employment with Railway Express Agency, Incorporated." It bears the inscription of form number "100", and is the form now used by the Company in accepting applications for employment with it.

* * * * *

21 Q. What are the Railway Express Agency's methods of paying its employees and agents?

A. As to salaried employees exclusively employed by the Railway Express Agency time records are maintained, as those employees are paid for time actually working. These time records are summarized, payrolls are prepared and payroll drafts issued by the Assistant Treasurers of

the company, the payroll drafts, in turn, being forwarded to the offices for delivery to the employees. In the case of commission offices, all commission agents render a monthly balance sheet to the Accounting Department of the Railway Express Agency on which are recorded the amounts due the Express Agency for express charges, etc.; a section of the balance sheet is set aside for recapitulating the various sources of revenue earned, on the basis of which the commission due the agent is computed. The total of this commission is taken credit for by the agent on his monthly balance sheet which he sends to the Accounting Department. After deducting his commissions from the amounts which he has collected for account of the Express Agency he remits the balance to an Assistant Treasurer
22 of the company. Salary employees are paid weekly or semi-monthly. In some isolated cases, casual or part time employees are paid on a daily basis. No time records are prepared for commission agencies.

* * * * *

24 *Cross Examination by Mr. Hassenauer.*

Q. Mr. Gross, you stated that you were the Auditor for the Railway Express Agency and that the duties imposed upon you were to the effect that you had charge of checking on the auditors reports that came into the office from your auditors on the road. Is that correct?

A. No, that is not correct. In the first place, my connection is that of General Auditor. We do not have auditors ~~or so~~ called auditors on the line. We have three regional accounting departments, each in charge of a general auditor. The General Auditor's office is comprised of the Auditor of Disbursements and the Auditor of Express Receipts. In the field the Express Company has 19 district accounting bureaus to which the agencies make their reports, each in charge of a district accountant. These district accountants report to the General Auditor, and in my territory there are nine such district accountants that report to the General Auditor in Chicago.

Q. The agents who make these reports, are they made to the company on any forms provided by the Railway Express Agency?

A. They are.

Q. Do you recall the number of the form that is used?

A. Form No. 96-B.

Q. Are any reports made more frequently than monthly by the joint agents?

A. I don't know, but where the agent is an exclusive employee of the Railway Express Agency, although compensated on a commission basis, and they are generally the more important of the larger commission agencies, we do require them to send their waybills and delivery receipts more frequently, however, we do not require them to make a balance sheet.

Q. Do you know whether the joint agents are asked to send in these later reports you have just mentioned?

A. Yes, they do send in their waybills and delivery receipts.

Q. By whom are the forms provided?

A. The statements and abstracts on which waybills and delivery receipts are entered are provided by the Railway Express Agency.

Q. So that there is no distinction made between the sole commission agents and joint agents with respect to filling out the forms for the business which they do for the Railway Express Agency?

A. We would expect anyone whom we engaged to handle business for us to make some kind of report of the business which they handle for us and in the same way we require the joint railway commission agents to make reports of the transactions which they handle for us.

Q. The reports which they give you are on identical forms provided by the company and which are used by the employees who are engaged solely on a commission basis?

A. At commission offices, that is correct. We use the same form of monthly balance sheet at a joint railroad express agency that we do at an exclusive commission agency. It is the same form, it is a combination form.

Q. What means is taken by the Railway Express Agency to protect the funds collected for the Agency by these joint employees?

A. The form 95 which I have submitted as Exhibit No. 10 shows what the agent is required to do as to protecting the company's funds at joint railroad express agencies or any commission agency. The special instructions speak for themselves.

Q. But they apply uniformly, do they not?

A. I wouldn't say that that was so.

Q. Is there anywhere on this sheet anything that shows it might be a joint agency that is paid on a commission basis?

26 A. It wouldn't appear so from these instructions. These exclusive commission agents are a much larger agency and probably would have facilities that a joint railroad express agency would not have.

Q. But the same form is used throughout?

A. Yes, the same form is used by the joint agents that is likewise furnished the exclusive agents by the Express Agency.

Q. What are you referring to?

A. To Exhibit No. 10. This form is prepared at the time of the audit and a copy is left with the agent.

Q. With respect to any funds that are on hand and in the possession of any joint agent, what precaution is taken by the Railway Express Agency to safeguard the funds? I am not speaking about this exhibit, Mr. Gross. What precaution is taken by the Railway Express Agency with regard to any funds collected by joint agents and in his possession before he has an opportunity to turn it over to his superior in charge, or officer who comes around monthly and makes these audits?

A. These audits are not made monthly.

Q. What becomes of the funds on hand? What instructions, if any, does the agent receive?

A. This form gives the agent instructions and the agent assumes the responsibility and if he has funds in excess of the amount he is allowed to keep overnight, he remits to the Assistant Treasurer of the Company.

Q. How frequently?

A. Depending on the amount that is collected.

Q. Is he permitted to retain these funds in his sole possession or cause them to be deposited in some safe or vault in the meantime?

A. No, I think these special instructions say just exactly how he is to protect them.

Q. Assuming there are some discrepancies in the joint agent's accounts as disclosed by one of the audits, what is the procedure employed by the Railway Express Agency to recover those accounts?

Mr. Hartung: I do not see the relevancy of this line of examination. It seems to me it is wholly immaterial whether this man is an agent as an employee or as an independent contractor, in either event there would be some responsibility on the part of that man as an employee or engaged as an independent contractor in conducting business for some other person, and I think for that reason that the line of examination that we are now pursuing is not material or relevant.

27 Examiner Schoene: Will you state the manner of relevancy?

Mr. Hassenauer: I am referring to Exhibit No. 11, which is the application for employment with the Railway Express Agency. If you have a copy of that perhaps I can get to the point directly.

Q. Mr. Gross, you introduced Exhibit No. 11, which consists of an Application for Employment with the Railway Express Agency. It is a fact, is it not, that the joint agents are required to fill out this form?

A. Those applications for employment do not come from the accounting department, they are handled in the operating department, and I think any testimony that you would like to have, or information you would like to have, in connection with the use of that form, will be given to you by a later witness.

Q. This Exhibit No. 11, which was introduced this morning, was also an application for Fidelity Bond. I will ask you whether or not that application must likewise be subscribed to by joint agents?

A. I think so, I am not certain.

Q. If there were any discrepancies in any of the accounts they would be called to your attention?

A. It would be developed in the operating department.

Q. And subsequently called to your attention?

A. It would be if we could not recover the amount from the employee.

By Examiner Schoene:

Q. Would you be charged with the recovery of that shortage?

A. It would be taken care of by the operating department.

Mr. Hartung: If you wish any further information with regard to the application for employment, Mr. Owens would be more competent to testify on this matter.

• • • • •

30 By Mr. Hassenauer:

Q. Take the amount 18,485, can you tell us the
31 number of joint railroad express agents that are in-
cluded in that figure?

A. Yes; I thought I gave you that figure. I testified that of the 18,485 commission or fixed allowance agencies, 16,769 are joint railroad-express agencies, and that of the 16,769 16,688 are allowed compensation on the commission basis and 81 of those agencies are compensated on a fixed allowance basis.

* * * * *

Redirect Examination by Mr. Hartung.

Q. Has the Interstate Commerce Commission prescribed the form of receipt which shall be used by express companies for accepting shipments for transportation?

A. It has.

Q. Has it prescribed the form of waybill that is to be used?

A. It has provided a general form. We have departed from that form in its actual dimensions, but most of the form is that prescribed by the Interstate Commerce Commission.

Q. The substance is prescribed by the Commission?

A. That is correct.

Q. Is there a different color used for one form and another?

A. The Commission prescribed that in the expressing of prepaid shipments we should use a yellowish printed form, whereas for collected shipments we should use a white colored form.

Q. It also prescribes the official express classification?

A. The official express classification for shipments transported by express has been prescribed by the Interstate Commerce Commission.

32 Q. Without qualifying you as an expert on express rate matters, are you familiar with the express rates and how they are divided into two classes, first and second class rates, and what those cover?

A. In the Express Rate Investigation in 1912, the Interstate Commerce Commission prescribed that traffic handled by the express company would be divided into two classes, namely, the first class and second class. The second class comprised articles of food and drink. The first class, all other traffic, the exception to that being on articles rated at higher than first class matter, such as specialty articles.

Q. Would you say that the Interstate Commerce Commission prescribed a uniform system of accounting for express companies?

A. It prescribed in 1914, effective July 1, 1914, the uniform system.

Q. Would you say the same classification of accounts is in effect today?

A. Yes, with some interpretations handed down from time to time.

Q. Is it true, Mr. Gross, that all persons, whether they are employees or independent contractors, or whatever they may be to conduct the express transportation business, they are provided with the same forms of receipts, classification, and rules and regulations in order to comply with the spirit and intent of the law?

A. Yes, that is correct.

Q. Do the orders of the Interstate Commerce Commission make any distinction whatsoever as to the classification of employees so that we have to use the uniform system, whether it be by joint commission or exclusive employees, or by persons who are independent contractors?

A. Yes, that is correct.

• • • • •

33 By Examiner Schoene:

Q. There is one point I am not clear on. You mentioned fixed allowance. Will you give us the distinction between a fixed allowance and commission?

A. In the first place our salary rates are established by law. They require the maintenance of time records, preparation of payrolls. A position is rated at a certain amount per month. We complete time records and pay the man for the time he is actually employed. If he works four hours he gets paid for four hours, and if he works eight hours he gets paid for eight hours. If he does not work at all he isn't paid. In the case of a commission office, generally the rate is about 10% and that 10% is applied to the charges accuring to the express company whether prepaid or collect on business handled at that commission office. There are other certain cases, and very few, where instead of paying an agent at the rate of 10%, or some other fixed rate, we make an allowance of $50.00 or $60.00 or $100.00 a month. He gets that whether he is on the job or not. He is supposed to employ someone else to handle the work when he is not there.

By Mr. Schreiber:

Q. Will you please state whether the General Rules and Regulations of the Railway Express Agency, Exhibits Nos. 8 and 9, are the same with respect to joint railway-express agents as they are with respect to exclusive commission agents, or are there any special rules or regulations concerning one group which do not concern the other?

34 Mr. Hartung: You will find when reading these regulations that in some instances they apply to employees and in other instances to agents. The rules explain themselves.

Br. Mr. Schreiber:

Q. Do the various sections in these rules differentiate between these classes?

A. They specify their application respective to employees and others. Some of them are so worded that they apply to both or all, and others do not apply to both. Specifically, it is different. Its requirements with respect to the conduct and handling of the business for the Express Agency on the part of a joint employee is the same as is the procedure or conduct prescribed for each in that classification. I think Mr. Owens will be very much better able to answer questions in that respect.

* * * * *

Examiner Schoene: There has been reference in the testimony and in the examination that there are joint commission agents and exclusive commission agents. As I understand the situation there are three classes of individuals involved who are compensated on a commission basis, that is, there are some persons who devote their entire time to the service of the Express Agency who are compensated on a commission basis; others who devote a part of their time to railroad service, and still others who devote only a part of their time to the Railway Express Agency and devote a substantial part of their time to other occupations. Now, when the term "exclusive commission agent" is used, does that refer simply to the first class, that is these who devote their entire time to Express Agency service?

Mr. Hartung: That is correct.

35 Examiner Schoene: And when you refer to "joint" you mean all others, and when you say "joint railroad express agent" you distinguish that group that works fo the railroad company as well as serving the Expres Agency?

Mr. Hartung: That is correct.

* * * * *

MR. W. W. OWENS, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hartung.

Q. What position do you hold with the Railway Express Agency Mr. Owens, and where are you located?

A. I am Vice President of the Railway Express Agency, with headquarters at Atlanta, Georgia.

Q. Will you give your experience with express companies?

A. I was first employed in 1892 by the Adams Express Company at St. Paul, Minnesota. I filled various positions in depot, clerical, and train service operation for a period of ten years with the Adams Express Company, leaving their service in 1902 as Route Agent with headquarters at Oskaloosa, Iowa, to enter service with the Great Northern Express Company, St. Paul, Minnesota. I filled various positions with that company for a period of twelve years in the accounting, operating and traffic departments, resigning as Superintendent of Traffic in December, 1913, to enter the employ of the Southern Express Company as Superintendant of Traffic with headquarters at Chattanooga, Tennessee. In January, 1916, I was appointed Traffic Manager of the Southern Express Company. In May, 1917, was appointed Second Vice President of the Southern Express Company with jurisdiction over traffic department, accounting department, supply department
36 and treasury department. I continued in that position
until July 1, 1918, at which time I was appointed General Manager of the Southern Department of the American Railway Express Company, occupying that assignment until January 1, 1920, when I was transferred to Washington as General Manager of the South Atlantic Depart-

ment of the American Railway Express. When the Railway Express Agency came into being on March 1, 1929, I was appointed General Manager, Washington, and continued in that assignment until September 1, 1931, when I was appointed Vice President of the Southern Department with headquarters at Atlanta, Georgia. The Southern Department comprises the territory generally south of the Ohio and Potomac Rivers, East of the Mississippi River, and the company's operation in Cuba; also territory in part of Maryland, southern Ohio, southern Indiana, southern Illinois, State of Missouri, State of Arkansas, and part of Louisiana.

Q. So that your experience has been very wide, both as to the extent of area covered by you and as to the various departments in the Express business?

A. I have been continuously employed in the business and have had experience in many parts of the country, and have never been out of the business since I entered it in 1892.

Q. It is true, is it not, that you are now Vice President in Charge of Operations?

A. Vice President in Charge of Operation of the Southern Department.

Q. Among the positions held by you is that of Route Agent, I think you said?

A. Yes, sir.

Q. Will you describe briefly the nature of the duties and authority of the Route Agent in the Express business?

A. The Route Agent is the official having direct supervision over the company's operation at joint railroad-express offices and their commission agencies; also jurisdiction over small exclusive offices. The Route Agent reports direct to and is under the direct supervision of the Superintendent. The Superintendent has jurisdiction

over a division, exercising, as stated, that supervision
37 through Route Agents in so far as smaller points
are concerned, and the agents at exclusive offices. Division Superintendents report to General Managers, who have charge of departments. There are from four to six superintendents, generally, in a department. General Managers with departmental supervision report direct to Vice Presidents in charge of operations in regions. There are four operating regions in the company's service: Eastern, Southern, Central, and Western regions, and that designation would particularly indicate the scope of each Vice President's jurisdiction.

Q. Mr. Owens, will you be a little more specific and cover a little more fully the duties of a Route Agent, as to how he exercises supervision, such things as auditing accounts and with regard to securing business for the company, and his relationship to the company and the employees, etc.?

A. The Route Agent represents the Agency in all of its contacts with the public and the agents at offices over which he has jurisdiction; he checks the accounts, supervises generally the conduct of the company's business to see that the company's rules and regulations are observed; solicits business from patrons, and is generally the representative of the company in any activity that may require the assignment of an exclusive individual—an individual exclusively employed to carry on any of the company's activities. He also has jurisdiction over the train messengers having charge of shipments moving in transit from point to point. The express business conducted by the Railway Express Agency is that wide. The Railway Express Agency conducts business in every state of the union, and, as testified to by Mr. Gross, in Canada, Alaska, and Cuba.

Q. Mr. Gross testified of operations, principally under contract with railroads; are there other operations that are contracted by the Railway Express Agency?

A. Yes, we have contracts with steamboat companies; with what in past days we called stage lines, now automobile lines or truck operators. Those contracts are in existence. They are departures from the standard operating agreement.

Q. Does the Railway Express Agency furnish air service?

A. It does; it operates all of the air express service in the United States.

38 Q. By reason of the wide application of the business do you have offices located where the volume of business is large and small, and are there various arrangements which are necessary to carry on the business? Will you describe some of the details and various arrangements that are made by this company and have been made in the past by express companies for the handling of business, particularly at agencies?

A. There are many different types of agencies. Originally it might be stated they were all of the same kind, small operations; but through what might be termed evolution the operations grew and are now conducted in large cities where we have very substantial employment. They are conducting business in small offices, but the small office today may be a large office tomorrow. That is graphically illustrated in the case, for instance, in what is going on right today in southern Illinois, where they recently discovered oil. A boom has started in that area. An office where a railroad agent had no trouble handling our business yesterday, figuratively speaking, can not now conduct the business, because it has expanded over night. Conversely, those offices shrink in the same way in the matter of volume of business transacted. In all cases the Railway Express Agency makes the very best arrangement it can for the proper handling of its business both economically as to itself and service as to its patrons. That office may be run on a commission basis with an exclusive employee, or it may be on a commission basis with a representative engaged in some other line of business. Usually the railroad agent is, in most cases; the transportation activity of every town centers around the railroad station, therefore it is logical, if an arrangement is possible, that the railroad agent represent or be the contractor of the Express Agency. His duties as railroad agent will permit him to handle the volume of the express business transacted.

Q. In those places, as testified to by Mr. Gross, the business is exceedingly small?

A. It is very small in some places. I know of offices where we have agents where probably they will not handle
more than three or four shipments a month. The aver-
39 age of most of these commission offices is shown as
two shipments a month forwarded.

* * * * *

42 Q. Mr. Owens, I show you a copy of Exhibit No. 11, Application for Employment, and ask you if that is the application that is taken from joint railroad-express agents?

A. It is.

Q. Now, is there any distinction made in the method in which that application is secured from people who become employees of the Express Agency and those who become agents who are also agents for a railroad company or who are engaged in other business?

A. Well, there is no distinction generally between this application as to the employee executing it. The application itself specifies that under certain conditions it will be an application for a fidelity bond, but actually it is not a fidelity bond in the sense that a surety company prescribes it. The Agency has its own application department to which these go and who investigate the integrity of the individual signing it. That, of course, is the prudent thing to do, because all employees handle the company's money and valuables and we have to know something about them; but that reference to a fidelity bond does not mean a bond necessarily furnished by an insurance company.

Q. Do I understand, then, that these joint agents are not bonded by a bonding company?

A. Not by the Express Agency; they are by the railroad company, I believe, but not by the Express Agency.

Q. Is there any distinction made or difference made with respect to requirements of the company as to filling out this form "Application for Employment" when made by persons who are to enter the employ of the company exclusively as employees or railroad agents?

A. Yes, there is a difference. For convenience the company has one form, but regardless of class of individual that represents it in the company's general rules and instructions. There is a difference or distinction made
43 as to details in which that form is to be filled out.

Q. Is there a provision in the company's rules in relation to that?

A. That is defined in the company's rules Nos. 1013 and 1014, and several of the rules following those. For instance, an individual in railroad employment need not fill out that part of the application that gives his employment for the past ten years, and he need not furnish a photo.

Mr. Hassenauer: I think it would probably be better if those provisions were read into the record.

Examiner Schoene: It does form part of the Exhibit which has been presented as Exhibit No. 8.

A. (Mr. Owens reading:)

"1013. Persons entering the service of the company, before appointment must be required to personally fill out, fully execute the Company's "Application for Employment," Form 100, also must have "Medical Examiner's Report" completed by the Company's designated physician, the cost of which will be assumed by the applicant. If last employment was with a railroad company, the applicant must, in addition, execute "Applicant's Order to Secure Record from Former Employer," Form No. 406."

"1014. Any person appointed to represent this Campany who is engaged in other business or is an employee of a railroad company and controlled by it and incidentally serving this Company and paid for such service, who declines to fill out the "Applicant's Record" portion covering ten years previous occupation, need not be required to do so but applicant must fill out the balance of the form, including the section "Application for Fidelity Bond and Agreement as to Losses by Negligence and Defalcation." This exception does not apply to persons engaged and controlled by the Express Company, but who incidentally serve a railroad company. Such employees in connection with the filling out of application for employment shall be considered exclusive, and complete application secured as provided in Rule 1013."

"1015. In entering the Company's exclusive service, the applicant should be required to furnish personal photograph to become a part of the application when forwarded to Superintendent, or A. & B. Department as directed."

"1016. If entering joint service, the photograph need not be insisted upon, but in such case a request for one should be made and same obtained, if possible. The name of the applicant, date of employment, position and town where located should be legibly written on back of photograph and accompany the application to Superintendent or A. & B. Department as directed."

Q. Would you have in the express service a substantial number of men who are engaged jointly as express messenger and baggage-man?

A. Yes, there are a large number of train service employees who are joint employees controlled by the express company whose activities are entirely directed by
44 the express company and whose service to the railroad are incidental to the express employment.

Q. Mr. Owens, you spoke about the lack of authority to promote and demote joint agents; what has been the practice with respect to the granting of vacations to joint express agents as far as express agents are concerned?

A. Express companies cannot grant a vacation to railroad agents; it does grant vacations to its own exclusive employees. That is one of the many differences between a railway agent handling express business as a contractor and an exclusive employee engaged in handling the same class of business.

Q. How about the pensions?

A. The pension plan of the Railway Express Agency did not apply to railway agents who may have been contract agents of the agencies.

Q. How about increases and decreases in wages, have they been extended to joint railway-express agents?

A. The salaries of all exclusive express employees has as its base Supplement 19, General Order No. 27, issued by the Director General of Railroads at the time the express business was under the direction of the Director General. All increases and decreases in salaries subsequent to the issuance of that order have been applied to exclusive employees and have not in any way affected agents, contract agents on a commission basis. There have been many proceedings involving increases and decreases, as a result of wage orders or arbitrations under Federal statutes, that have applied to exclusive employees but did not apply to contract agents.

Q. What you have said in regard to working conditions, vacations, pensions, etc., have those conditions existed in the express business continuously since before the American Railway Express Company was in operation?

A. Those conditions existed at the time I entered the business in 1892, and prior to that, there has been practically no change in the way it has been conducted.

Q. You started to make a statement about the various ways in which the express business is conducted at agencies and I think perhaps I interrupted, will you please amplify your statement?

45 A. In the larger offices we have exclusive employees performing what is generally known as complete service from shipper to consignee. As an illustration, in Washington the Railway Express Agency operates a large number of motor vehicles, employs a large number of exclusive depot employees, clerical employees, and employees that call at a patron's place of business for shipments to be transported by train, and delivering shipments at destination. At intermediate type offices where the business is not as large, the same procedure is obtained to the degree that the business justifies. At the small office there is no independent representation, no special office, no fixtures, no exclusive facilities for the handling of the business, but it is conducted usually by the railroad agent in the quarters provided by the railroad company for the handling of the railroad business. At the smaller offices that can nearly always be done without any interference with the performance of the agent's duties as the railroad representative.

Q. You have some other small offices, where you have an arrangement with someone other than the railway agent. Will you describe?

A. We have some offices where the business is not handled by the railway representative for different reasons: either the refusal of the railway agent to handle the business, or the fact that there is no railway agent at the point, or perhaps his duties will not permit the business of the express company being handled by him, and we therefore obtain a contractor, independent of the railroad, to handle the business, compensating him practically always on a commission basis.

Q. He might be a merchant in the community, or a drayman?

A. Yes, he might be a merchant in the community, or a drayman, or in certain parts of the country, at certain times of the year, a fruit or vegetable dealer who handles business by express where there is no railroad agent, and he makes the best arrangement that he can for the handling of the business.

Q. You heard Mr. Gross testify, Mr. Owens, and you heard what he said with respect to the month of March being the month in which the express business was larger in comparison than other months?

A. I did.

Q. What would you have to say with respect to
46 March and to the handling particularly, of business at commission agencies?

A. The month of March in the Southern jurisdiction is the largest month of the year, almost invariably. There may be some climatic condition that would interfere with the movement of perishables during that month, but usually March is the largest month of the year.

Q. What you say about the handling of perishables in March leads me to ask this question: Is the nature of the business such that at certain points you have a particularly large volume of business during certain months of the year with a comparatively small business the remaining months of the year?

A. That is quite common, especially in the territory where commodity traffic is shipped from during the producing season the volume of business is particularly high and when the producing season is over business drops to practically nothing. There is nothing uncommon about that.

Q. So that during a month or two of the year you have enough business to justify maintaining your own employees. During the remaining months of the year you wouldn't have enough business to require their service and to handle the business in that way?

A. That is true. In some cases the volume of business is so large that the Express Agency could economically have exclusive representation but when perhaps six weeks or two months are over it is entirely conceivable that the gross revenue would not equal the salary of the agent.

Q. Is it a fact. Do you know of such instances?

A. Yes.

Cross-Examination by Mr. Hassenauer.

Q. You testified, Mr. Owens, that at one time you were a route agent for the Adams Express Company?

A. Yes.

Q. From your previous experience covering the period from 1892 up to the present time, are you more or less acquainted with the duties of a joint express agent?

A. Yes.

Q. Can you tell us what those duties are or consist of?

A. Of course the first duty is the handling of the business of the railway company as prescribed by the railway company and, as incidental and as supplementary to those duties, the handling of the business of the express agency that is received or forwarded from that office.

47 Q. As a joint agent he receives, delivers, and forwards express shipments?

A. Yes.

Q. Does he issue bills of lading and waybills?

A. He does not issue bills of lading, he receives them.

Q. I mean receives them. He collects express charges on express shipments?

A. Yes, on collect shipments received and prepaid shipments forwarded.

Q. Also C.O.D. shipments?

A. Yes, he collects C.O.D.'s.

Q. Does he issue and handle express money orders also?

A. Not always.

Q. In some instances he does?

A. Yes, sir.

Q. And throughout he maintains records that are provided for him by the Railway Express Agency?

A. He does.

Q. And he makes periodic reports to the Agency upon the business which he transacted for it?

A. He does.

Q. Just how does this arrangement come about between the station agent and the Railway Express Agency?

A. Well, if he bids in an agency the agency usually handles the express business and we endeavor to make that arrangement with him.

Q. As a matter of fact, it arises out of the express operations agreement between the Railway Express Agency and the carrier by whom the joint agent is primarily employed?

A. Yes.

Q. More particularly, it comes out of Article XI of that Agreement?

Mr. Hartung: That is not the Article that covers that.

Q. Mr. Owens, I call your attention again to Article XI on page 22 of Exhibit No. 1. What, if anything, do you see in the right hand margin opposite the first line of that Article?

A. It is an index which reads "Joint Employees."

* * * * *

49 Q. Are there any rules that apply to joint railway agents?

A. Every law that applies to a common carrier by rail applies to the express agency, and where it is necessary to put that law into the possession of the company's agents, be they exclusive or contract, it has to be done.

* * * * *

50 Q. What is the policy where a joint agent is on a vacation? What arrangements are made by the Railway Express Agency with respect to the conduct of its business through that particular railway station?

A. I have never known where a railway agent went on a vacation where he wasn't replaced by another individual who was familiar with the business the same as the other agent.

Q. What arrangements would you enter into?

A. The accounts are transferred as between the individuals as testified to by witness Gross, and recorded on Form 95.

Q. I call your attention to the Application for Fidelity Bond, as provided. Have you had any experience to proceed against a joint agent because of falsification of records or embezzlement?

A. Unfortunately we have had some employees do this.

Q. What procedure is followed by the Railway Express Agency?

51 A. We endeavor to collect the shortage owing us.

Q. In the event you are unable to collect do you continue to have the express matters handled by that joint agent?

A. If the man is short in his accounts we take the agency away from him.

Q. And turn it over to some other individual?

A. Yes, we naturally wouldn't continue in our employ any habitual embezzler of funds.

Q. You stated a while ago that wherever possible you prefer a station agent to handle your business?

A. We naturally prefer that because the trans-
52 portation activities of the town center around the railroad depot. The railway company furnishes the facilities for conducting that business and housing the shipments received and forwarded, and the trains stop there; naturally, that is a convenient place to do it.

Q. The furnishing of the facilities for the conduct of this business through this agent is added to this arrangement by the railroad. Do you pay any rent for the use of the railroad company's property where a joint agent is handling the business for the Railway Express Company?

A. No. No separate facilities are provided.

Q. Where they are provided, satisfactory arrangements to retain the station agent are made, are they not?

A. That is logical. We use the railroad agent if we can, because of the fact that he should be the best qualified man in the community to conduct this business.

Q. You have used the words "salary" and "compensation," Mr. Owens, do you distinguish between the two?

A. Positively. Salary is the amount paid for service rendered. Where I have used "compensation" as referring to a joint railway-express agent, it refers to the agent retaining for the conduct of the business a sum which is computed on a commission basis.

Q. But the word "compensation" may include the word "salary", would it not?

A. It would.

Q. It may include commission, may it not?

A. Not necessarily.

Q. Well, what would you say the word "compensation" would include?

A. It is not necessarily the same thing to a joint railroad-express agent or a commission agent. What the express company considers payment is a sum deducted for the conducting of the business in the place where he is the representative.

Q. There was some testimony produced this morning by Mr. Gross that there were some flat payments made these railroad station agents in amounts of from $50.00, $60.00 and $100.00; would you say that those amounts were covered by the word "compensation"?

Mr. Hartung: I object to that. We are involved here only with the question of those persons on a commission basis.

Mr. Schoene: It may be relevant to establish the status of the commission agent, to compare the circumstances. Do you see any prejudice in the admission of the testimony, Mr. Hartung?

Mr. Hartung: That does not seem to be relevant.

Examiner Schoene: It will be admitted for whatever value it has in the record.

A. That might not be compensation to the agent because in all instances of that kind, and there are only a few, very few, of the 18,000 offices the Agency has that are confronted by some unusual condition.

53 It is generally because the office is so small the agent has to render some other service; for instance, transfer of trains to and from branch lines; we have to pay him for that service for which he gets no commission, and we make an arrangement with him to give him a flat sum per month. That may not be his money; he may use part of it to pay somebody else.

Q. Mr. Owens, throughout the handling of the Express Agency's business by the joint agent, their express accounts are subject to the audit of the Express company?

A. Yes.

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Q. Aside from the checking of accounts, Mr. Owens, by the auditor are the duties performed by the joint agent checked over or examined by any employee of the Express Agency besides the Auditor of Accounts?

A. On the periodical visits which the route agent makes to the agency where the agent of the railroad company is the commission agent of the express company, the route agent observes how the business is being handled.

Q. Would the superintendent make any examination of the manner in which the joint agent was conducting his business?

A. Not unless there is some unusual circumstance.

54 Q. If a report was received by the Division Superintendent and was not in conformity with instructions, would he be checked by the Superintendent?

• • • • •

A. It would be most unusual for the Superintendent to arrange or conduct such an examination.

Q. Would a joint route agent have occasion to check into the work of a particular division? Would he have occasion to check into the work of a joint railroad-express agent?

A. Periodical examinations showing the manner in which the express agency business is being conducted at agencies where the railroad agent is the commission agent for the express company.

Q. In examining the work of the joint agents, Mr. Owens, by the route agent, does he submit any suggestions as to the manner in which this business can be carried on more efficiently and economically?

A. Efficiently, yes, but economically, no; the agent is paid out of the funds accruing to the company as the business is transacted, and would not be more economically nor more expensively handled, but more efficiently.

• • • • •

56 Q. I understood you to state, Mr. Owens, that vacations are not given by the Express Agency to those who are joint agents; that is correct, isn't it?

A. No we do not give vacations to joint agents.

Q. Do you give vacations to all other agents?

A. All exclusive agents.

Q. In other words, all exclusive employees get vacations?

A. All exclusive employees get vacations whether on commission or a salary.

Q. Do commission agents get the right to a pension?

A. A commission agent was entitled to a pension under the pension rules of the Express Agency if he was exclusively employed.

By Examiner Schoene:

Q. In connection with vacations in the cases of exclusive commission agents, do they draw pay during the period of their vacation?

A. Oh, yes.

Q. How is that determined?

A. He receives the commission accruing during the period of his vacation. The man assigned to take over his work is paid the same commission. In other words, the company pays twice.

Q. But that arrangement would never obtain in a joint railroad-express office?

A. It would not.

By Mr. Schreiber:

Q. Will you please describe the distinction between the method of payment of an exclusive agent and a joint agent?

A. An exclusive agent, as Mr. Gross has testified, is obliged to subscribe to the time record and payroll
57 submitted and is paid by check issued by the Assistant Treasurer. A joint railroad-express agent de-

ducts from the funds accruing at that office for the sum due to him for conducting the express business at the office and remits the balance to the designated Assistant Treasurer of the company.

Q. In other words, an exclusive commission agent is paid in the same manner—

A. (Interrupting): *An* exclusive *agent deducts his* commission.

Q. An exclusive commission agent, as well as the joint agent, deducts his commission?

A. That is right.

Q. There is no difference in the method of payment, then?

A. No.

Q. Is an exclusive commission agent reported by you to the Interstate Commerce Commission?

A. Yes.

Q. The same as a salaried employee?

A. Yes.

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58 Q. I think there has been offered in evidence here two documents; one, the Application for Employment; the other, Form No. 95; both of which are executed in whole or in part in connection with entrance upon this relationship of express agent in one of these joint agencies. Is there any document, any other document, which expresses the relationship between these parties?

A. No; not that I know of.

Q. Now you spoke, I think, of the application of certain pay increases and testified, if I recall correctly, that

59 pay increases or decreases did not apply to the joint agents. Is that correct?

A. That is correct.

Q. Did these apply to exclusive commission agents?

A. No, sir

Q. In other words, that did not apply to any—

A. (Interrupting:) Anybody who is on a commission basis.

Q. In connection with the relationship that is established between the Railway Express Agency and one of these joint agents is there any document or agreement *which defines* the right of cancellation? In other words, assuming that the Express Agency wants to cancel the relationship, terminate it, is there any instrument or document to which one may look for the circumstances under which it may be terminated?

A. No, there is no document.

Q. Is it the general understanding in the field of operations that that relationship may be terminated at the will of the Express Agency?

A. No, not without an unusual cause. You must first understand that in all of these joint operations the railroad agent is anxious to get this work because it supplements his railroad pay with practically no additional work on his part, and he is anxious to get that commission, and they are almost invariably ready and willing and anxious to do this work for the Express Agency. It is only the very few cases, the exception, very few exceptions, when that does not obtain.

Q. Therefore, he might be expected to object if you did terminate the relationship?

A. Oh, yes.

Q. What I am trying to get at: what would he found his objection on; just that you done him wrong?

A. As a practical matter, the Express Agency would have no cause for objection unless the agent had done the Express Agency wrong. That is not on the record.

Q. As a matter of practice you would never terminate it unless you knew—

A. (Interrupting): Some unusual condition that justified that being done.

60 Q. Mr. Owens, suppose for instance the agency, the volume of business grows to a point where you want to establish an exclusive agency, a full time proposition, would you then feel free to do that even though the joint agent might object to the conduct of the Express Agency establishing an exclusive agency?

A. A practical application of that condition, the Express Agency would go to the railroad company and indicate the necessity of dissolving the joint arrangement, and naturally the Express Agency wishes to avoid such condition as much as it can because that means setting up independent offices where we must pay rent and light and heat and all the incidental expenses that go with matters of that kind, so we always stay in the railroad offices just as long as can be done, and when business expands the commission, of course, grows and the agent is usually able to get somebody, out of this increased commission, to get someone to help him conduct the business if it is more than he can handle.

Q. Do you ever, on occasions, establish an exclusive agency where previously there had been one of these joint arrangements?

A. That has been done.

Q. When that has been done did you give any notice to the joint agent?

A. That had to be done by the railroad company, his employer. The railroad company notifies him that the joint office is to be dissolved, and we take it up and establish an independent agency.

Q. There would be no direct contact between the Railway Express Agency and the joint agent?

A. The first move would be with the railroad; of course, in carrying out the change we would have to send a man there to check the joint agent out, and he would be advised —he would probably know before—the circumstances that caused the change to occur.

* * * * *

61 Q. Is there any difference in the degree of liability for damages caused by their negligence, say by the negligence of a joint agent, than there is in the liability for damages caused by the negligence of an exclusive employee or an exclusive commission agent?

Mr. Hartung: I object to that, because there have been cases where the courts have held that where a man, if an agent he is.

Q. Is there any difference in the responsibility, in the limit of loss occasioned by the services of a joint agent and an exclusive commission agent, to the Agency itself? In other words, what are your remedies against a person who is a joint agent and a person who is an exclusive employee or an exclusive agent where they cause loss or damage?

A. If there is embezzlement of money there is no distinction. If there is loss caused by damage to a shipment, the company pays the loss; we do not charge claims to employees or to joint agents.

Q. Is there any distinction as to discipline between a joint agent and an exclusive commission agent?

A. We cannot discipline a joint agent.

Q. And you cannot take away the services of a joint agent?

A. Sometimes we can and sometimes we cannot; that depends upon the railroad, whether the railroad wants the business or not. It is pretty difficult to state a rule that will govern.

Q. Do I understand that if you wish to terminate the relationship with a joint agent you are required to take the railroad's decision?

62 A. Because the railroad company will not dissolve the joint agency, and we cannot find anyone to attend to the business.

Q. So it is in your power to discontinue the relationship?

A. To discontinue, yes; to that extent, yes.

Q. In forming the relationship with the joint agent, he may or may not accept your offer is not that right?

A. That is right.

Q. So he is a free agent when he accepts?

A. He is.

Q. And you are a free agent when you terminate it?

A. I have endeavored to illustrate circumstances, that in some cases we can and in others we cannot.

Q. I think you have testified in respect to examination of the proceedings of various employees by your Auditor and other officials; is there any distinction in the method of examination of the records of a joint agent and those of an exclusive agent?

A. No, except to the extent that in the joint agency the record is so small that a man can go over it in a few minutes and audit the accounts; in a large commission agency it may take him a long time.

Q. Have you with you any contracts with joint agents or with persons employed on part time service?

A. Yes; form 100 and form 95 are the only forms of contract the company has.

* * * * *

600 Jurisdictional Docket No. 2
L-38-340
3-19-38
Approved by Bd. on March 24, 1938
First Hearing.

RAILROAD RETIREMENT BOARD

Washington, D. C.

EXAMINER'S REPORT WITH RESPECT TO THE ORDER OF THE RAILROAD RETIREMENT BOARD DATED OCTOBER 28, 1937, DIRECTING THE GENERAL COUNSEL TO HOLD A HEARING, TO ACT AS EXAMINER OF THE BOARD, TO RECEIVE ARGUMENTS AND TO FORMULATE FINDINGS OF FACT AND CONCLUSIONS OF LAW, TO ENABLE THE BOARD TO MAKE PROPER ANSWER TO THE FOLLOWING QUESTIONS:

1. "Are persons performing duties for the Railway Express Agency in return for compensation on a commission basis, and who devote substantial portions of their time to other occupations, particularly railroad service, to be classified as employees under the Railroad Retirement Acts of 1935 and 1937?"
2. "Is the time devoted to the performance of such duties for the Railway Express Agency, or its predecessors, creditable as 'service' toward annuities under said Acts?"

602

Part I.

Introductory.

On October 28, 1937, the Railroad Retirement Board directed me, as General Counsel, to hold a hearing and to act as Examiner of the Board, to receive arguments and, thereafter, to formulate findings of fact and conclusions of law to enable the Board to make proper answer to the following questions:

> "Are persons performing duties for the Railway Express Agency in return for compensation on a commission basis, and who devote substantial portions of their time to other occupations, particularly railroad service, to be classified as employees under the Railroad Retirement Acts of 1935 and 1937?
>
> "Is the time devoted to the performance of such duties for the Railway Express Agency, or its predecessors, creditable as 'service' toward annuities under said Acts?"

In accordance with that order, a hearing was held on December 15, 1937, at the Board's offices in Washington, D. C., in which hearing the Railway Express Agency, Inc., The Order of Railroad Telegraphers, and The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, participated. Two representatives of the Bureau of Internal Revenue entered appearances at the hearing but did not otherwise participate in the proceedings. Subsequently, a brief was filed by the Railway Express Agency, Inc., and a joint brief was filed on behalf of the Order of Railroad Telegraphers and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. It was the desire of the parties to present oral argument in support of their respective positions, and such argument was heard on January 17, 1938, at the offices of the Board, in which argument the Railway Express Agency, Inc., and the Order of Railroad Telegraphers participated. Transcript of the proceedings at the hearing and the oral argument are attached hereto, and are made a part of this report.

The Railway Express Agency, Inc. is a Delaware Corporation, engaged in the transportation of property by express throughout the United States, Canada, Cuba, Alaska

and Hawaii, and is subject to Part I of the Interstate
603 Commerce Act. The Railway Express Agency, Inc.
began its operations on March 1, 1929, and, with respect to express business, is successor to the American Railway Express Company, which had conducted express transportation business since July 1, 1918, when it succeeded the Adams Express Company, the American Express Company, the Southern Express Company and Wells Fargo & Company, the principal express companies in the United States operating at that time. The Railway Express Agency, Inc. and its predecessor express companies are hereinafter referred to as the Express Agency.

The Express Agency operates, by virtue of a contract with each company, over the lines of all the railroad companies in the United States, except the lines of the Southern Railway Company and its affiliated carriers by railroad. These contracts are uniform in their terms following a form known as the Standard Express Operations Agreement, and are similar in their terms to contracts previously existing between the American Railway Express Company and the various railroads. In the year 1936, the Express Agency had 20,159 offices throughout the United States, of which 1,674 were offices at which the agents were paid on a salary basis, and 18,485 were offices at which the agents were paid on either a commission, or a "fixed allowance" basis. Of the latter group, 16,769 were offices where the agents were joint railroad-express agents, of which 81 were compensated on a "fixed allowance" basis. Of the remaining 1,716 offices, some were operated by agents paid on a commission basis who devoted all their time to the service of the Express Agency, and the others were operated by individuals, such as merchants or draymen, also paid on a commission basis, but who devoted only a portion of their time to service for the Express Agency. The record indicates that the amount of business handled at these agencies varies considerably, that the average number of shipments handled at commission offices during the year 1936 was 7 per day, and that the average number of shipments handled at salary offices during that year was 426 per day.

The situation described above and hereinafter
604 described in more detail, has existed without substantial change (except in volume) at least since 1892. (Record, Page 40.)

Individuals rendering service for the Express Agency may, for the purpose of this report, be divided into the following six groups:

(1) Individuals (some of whom are in charge of agencies) who devote all their time to Express Agency service and are paid on a wage or a salary basis from the regular pay roll. These individuals are hereinafter called "exclusive employees".

(2) Individuals in charge of agencies, who devote all their time to the service of the Express Agency and who are paid on a commission basis. These agents are hereinafter called "exclusive agents".

(3) Individuals who perform service both for the Express Agency and for one or more railroad companies and who are paid either by the Express Agency or by the railroad company on a salary basis from the regular pay roll for both their express and their railroad service.

(4) Individuals who perform service for a railroad company for which service they are paid by the railroad company and who also are in charge of agencies for the Express Agency, for which they are paid on a commission basis by the Express Agency. These individuals are hereinafter called "joint agents".

(5) Individuals who perform service for a railroad company, for which service they are paid by the railroad company and who also are in charge of agencies for the Express Agency, for which latter service they are paid on a "fixed allowance" basis by the Express Agency.

(6) Individuals who are in charge of agencies for the Express Agency, who are paid on a commission basis, who devote a substantial portion of their time to other non-railroad business, such as merchants, draymen, and the like. These individuals are hereinafter called "merchant agents".

The Express Agency specifically admits (Record,
605 Page 31) that the individuals in group (2) above are
its "employees" within the meaning of the Railroad Retirement Acts of 1935 and 1937, and no doubt has ever been raised that the individuals in groups (1) and (3) above are employees under the Acts. However, the Express Agency denies that the individuals in the last three groups are such "employees". It is with respect to the status under the Railroad Retirement Act of the individuals described in groups (4) and (6) above that the Board's order of October 28, 1937, directed me to hold a hearing, to act as examiner of the Board, to receive arguments and to formulate findings of fact and conclusions of law.

The individuals in Group (5) do not fall wholly within the terms of the Board's order directing this hearing. However, the record indicates that there is no material distinction between such individuals and the individuals in Group (4). It is, therefore, recommended that the Board's decision include a disposition of the status of the individuals in Group (5) in accordance with the decision concerning those in Group (4), subject to the right of any interested party to reopen that question by a tender of evidence indicating further material distinctions.

Part II.

Discussion.

Section 1 (b) of the Railroad Retirement Act of 1935 provided in part as follows:

> "The term 'employee' means any person * * * in the service of a carrier"

Section 1 (c) of the same Act provides as follows:

> "A person shall be deemed to be in the service of a carrier whenever he may be subject to its continuing authority to supervise and direct the manner of rendition of his service, for which service he receives compensation."

Section 1 (b) of the Railroad Retirement Act of 1937 provides in part as follows:

> "The term 'employee' means (1) any individual in the service of one or more employers for compensation, * * *"

Section 1 (c) of that Act defines the phrase "in the 606 service of" as follows:

> "An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation: * * *"

The Express Agency is a "carrier" within the meaning of the Railroad Retirement Act of 1935 and an "employer" within the meaning of the Railroad Retirement Act of 1937 and admittedly the individuals whose status is in question are paid for their service. It is not contended that the joint agents, while rendering service for the Express Agency, do so as employees of the railroad companies. Therefore, our only inquiry is whether the joint agents and merchant agents in their relation to the Express Agency are "employees" within the meaning of the Act, or whether their relation is such as might be termed "independent contractor".

The Express Agency contends that, under the above-quoted provisions, the Railroad Retirement Act of 1935 and the Railroad Retirement Act of 1937 (both hereinafter referred to as "the Act" or the "Railroad Retirement Act") cover only individuals in the relationship of "master and servant", and exclude those in the relationship of "independent contractor", as those terms are defined at common law. In support of its contention The Express Agency quotes statements of the common-law rule from the opinions in the cases of *Standard Oil Company* v. *Anderson*, 212 U. S. 215, *Norton* v. *Day Coal Company*, 180 N. W. 905, and *McColligan* v. *Pennsylvania Railroad Company*, 214 Pa. 229 the effect of which is that, at common law, an individual is a "servant", as distinguished from an "independent contractor", if he is subject to authoritative direction and control as to the methods, means and details of doing the work, and not merely as to the ultimate results to be accomplished. The Express Agency further quotes, in support of its contention, part of a paragraph from the opinion of the United States Circuit Court of Appeals, Sixth Circuit, in the case of *Nashville, Chattanooga & St. Louis Railway* v. *Railway Employees' Department of The American Federation of Labor, et al.*, decided December 7, 1937, interpreting the following definition of employee in the Railway Labor
607 Act as amended:

> "Every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission * * *"

The paragraph in the court's opinion from which the Express Agency quoted reads as follows:

> "The primary requirement of the statutory definition is that the term 'employee' as used therein shall include every person 'in the service of a carrier.' The parenthetical clause adds nothing to that either by way of limitation or amplification. It but codifies the common law rule of master and servant. * * * We are left to a determination of what is meant by the phrase 'in the service of a carrier'." (underscoring supplied)

I am not persuaded that the court's expression of opinion with respect to the codification of the common law is in any way controlling. The material question before the court was whether the parenthetical clause was intended as a complete exposition of the characteristics of all persons entitled to vote as employees. The court's conclusion was that the parenthetical clause was addressed to the type of service embraced within the conception of employee, and that it was not relevant to a determination whether an individual connected with a type of service embraced within that conception would be an employee during intervals when he was not rendering active service. In other words, there was no issue in the case as to whether the parenthetical clause, in defining the types of service covered, followed precisely the line of the common law between the master-servant and independent contractor relationships. The court's reference to the common law merely expresses an assumption with reference to a matter not material to the decision.

It is a well-known fact that the common-law cases differ considerably in language when setting forth the test of the master and servant relationship. This is well illustrated by contrasting the statements in *Standard Oil Company* v. *Anderson*, 212 U. S. 215, and *Arne* v. *Western Silo*

Company, 242 North Western 539, (which set forth tests substantially in accord with the parenthetical clause in the Railway Labor Act and the definition in the Railroad 608 Retirement Acts) with the language of *Underwood* v. *Commissioner of Internal Revenue*, 56 Fed. (2nd) 57 and *Western Indemnity Company* v. *Pillsbury*, 172 Cal. 807, 159 Pac. 721, (which set forth a variety of additional considerations)—and all these cases are cited by the Railway Express Agency in its brief as showing the common-law test of the master and servant relationship.

In view of these circumstances, I am inclined to the view that the Railroad Retirement Acts seek to set forth a definite statutory test of service which does not differ substantially from the common-law tests stated in many of the cases, but is nevertheless in substitution therefor. However, a decision to this effect is not necessary for the solution of the questions presented at this time. The same conclusion is reached whether the statutory language is regarded as a single uniform test or whether the so-called "common-law tests" are applied. In the discussion of the evidence throughout this report, the common-law tests, as best they can be ascertained, will be applied to the evidence.

(a) Joint Agents.

These individuals, described in Group 4, when engaged to render service for the Express Agency, are required to complete and sign two forms, one entitled "Application for Employment" (Exhibit No. 11) and the other "Railway Express Agency Form 95" (Exhibit No. 10). These two forms are the only documents which express the relationship between the joint agents and the Express Agency (Record, Page 53). The "Application for Employment" requires the applicant to furnish certain information with respect to his personal history and his physical condition.

This application also includes as a part thereof an "Application for Fidelity Bond and Agreement as to Losses by Negligence and Defalcation", which reads in part as follows:

> "This Agreement, made this day of , 19 , between hereinafter called the 'Subscriber' and the Railway Express Agency, Incorporated, hereinafter called the 'Company.'
>
> "Witnesseth: That in consideration of the employment of the Subscriber by the Company and of the wages paid or to be paid to him by it and of other valuable consideration, receipt whereof is hereby acknowledged."
>
> 609 "A—The Subscriber agrees that he will throughout his employment by the Company faithfully perform all of his duties, including the keeping of true and correct accounts of the business of the Company conducted by him or in his charge, all as required by the rules and regulations of the Company; and he understands and agrees that he is to be held personally responsible for the repayment to the Company of any and all losses which it may sustain through his failure to do so." (underscoring supplied)

The Form—95 reads in part as follows:

> "Special Instructions to Agent."
>
> "The Railway Express Agency, Inc., will not be responsible for money in excess of $ carried over night. The Agent at this station is authorized to leave in office safe over night financial paper and funds not exceeding the amount specified. All funds in excess of that amount should be remitted by first train to depositary of this Company. No funds, financial paper, or other valuables should be left in safe at night, unless Agent or other employee of the Express or Railway Company sleeps or works in office or adjoining room all night, nor in office at

other times when Agent is absent therefrom, unless some other bonded employee is on duty and in charge. Where office is furnished with a safe, but agent or other employee of Express or Railway Company does not sleep or work in office or adjoining room all night, or at office not provided with a safe, money, financial paper and valuables must be taken home by the agent at night. Railroad Agents who also act as Agents for the Express Company may follow the rule of the Railroad Company.

"I understand that the rate of commission allowed at this agency is: ____ % on all L.C.L. express charges and ____ Maximum ____
Carloads: Local Shipments ____ % Min. ____
Max. ____ Interline Shipments ____ % Min.
____ Max. ____ I have this day been instructed by Route Agent ____
regarding the handling of money and valuables and the manner in which express remittances are to be forwarded from this office.

I fully understand that express remittances will be handled as follows, and I will make no change in this plan without written authority from Superintendent's office.

____

____

____

"I certify that the above is a true statement of my Accounts and Cash. Instructions shown hereon are fully understood and will be complied with. (underscoring supplied)

Receipt of Cash and other items shown above are hereby acknowledged. Instructions shown hereon are fully understood and will be complied with. (underscoring supplied)

____

Employee Position Employee Position"

The first question to be considered is whether the language of these forms, considered in the light of the circumstances, gives to the Express Agency "authoritative
direction and control" of the joint agents "in the
610 performance of their work"; (*Standard Oil Company*
v. *Anderson*, 212 U. S. 215) or "the right to exercise control over methods and detail to direct how the result is to be obtained." (*Arne* v. *Western Silo Co.*, 242 N. W. 539.)

In the above-quoted portion of the "Application for Fidelity Bond, Etc.", there appears the following statement: "The subscriber agrees that he will throughout his employment by the Company faithfully perform all of his duties, * * * all as required by the rules and regulations of the Company; * * *." There is nothing in the above language to restrict or limit the kind of rules or regulations which the Express Agency may adopt; therefore, under this language the Express Agency has the authority to issue rules and regulations relative to "how the work is to be done" as well as "what is to be done."

Even if there were nothing more than the above-quoted provision to indicate the extent of the Express Agency's authority over the joint agents, their status as "employees" within the meaning of the Act would be established because the "right to exercise control over methods and detail" or "the power to control and direct" is sufficient to establish the status of "employee" within the meaning of the Act even though the control is not in fact exercised. (*Standard Oil Co.* v. *Anderson*, *supra*; *Arne* v. *Western Silo Co.*, *supra*. However, the circumstances in this case show that the Express Agency did reserve the right to exercise control over methods and detail, and it is a fact that the Express Agency actually exercised such control.

In the first place, the above-described forms are used not only in engaging joint agents, but also in engaging

other individuals, including exclusive agents, who admittedly are employees within the meaning of the Act. In these forms the terms "applicant", "employee", "subscriber" and "agent", none of which are inconsistent with the conception of "employee" as defined in the Act, are used to designate exclusive agents as well as joint agents; and exclusive agents are admittedly subject to the control
of the Express Agency over methods and detail. Fur-
611 thermore, it is particularly significant that individuals
who admittedly are employees within the meaning of the Act, and joint agents both subscribe to the same provision that "the subscriber agrees that he will throughout his employment * * * faithfully perform all of his duties * * * all as required by the rules and regulations of the company", which provision is descriptive of the obligations assumed by them. If the language of these forms is descriptive of the status and obligations of individuals who admittedly are "employees" under the Act, it would seem that the same language when used with respect to joint agents is descriptive of exactly the same status and obligations.

The Express Agency points out that, although the same forms are used in engaging individuals who are admittedly "employees", as well as joint agents, the former are required to furnish personal photographs and statements of their employment records for the ten years preceding their applications, while the joint agents are merely requested to meet these requirements. However, there would appear to be as much reason for securing a photograph and satisfactory evidence of character and reliability in engaging an individual who is to be "independent" as there is in engaging one who is to be an "employee", because an individual who is "independent" has more responsibility than an "employee". Therefore, whatever may be the Express Agency's reason for not requiring a photograph and employment record in engaging joint agents, it surely cannot be for the reason that they are to be "independent".

Furthermore, the general character of the business of the Express Agency makes it almost imperative that it reserve the right to control its agents, as to method and detail, whether they be joint agents or exclusive agents. The record shows that the Express Agency employs a joint agent in each of more than 16,000 small communities. It also appears that in carrying on its business as a common carrier the Express Agency must comply with numerous regulations of the Interstate Commerce Commission, must meet certain obligations to its patrons, and must maintain close harmony and cooperation with the operations of the railroad companies. It is evident that the work of the Express Agency must be done in such a
612 manner as will insure compliance with the regulations
of the Interstate Commerce Commission, fulfillment of the Express Agency's obligations to its patrons, and will make for harmony and cooperation with the business of the railroad company. In view of this complex situation, it is unreasonable to believe that the Express Agency intended that each one of these 16,000 or more joint agents was to devise his own methods for achieving the desired results. Therefore, it necessarily would follow that the Express Agency, in engaging the joint agents, would reserve the right to instruct them as to how they should perform their duties, and to revise the instructions from time to time as its own discretion might indicate.

As a matter of fact, the Express Agency has issued rules and regulations applicable to joint agents, which rules and regulations go beyond results and relate to methods and detail. The following excerpts from the "General Rules and Instructions" of the Express Agency (Exhibit No. 8) are fairly representative of such rules and regulations:

"214. Agents must be prepared to load and unload express matter promptly to avoid delay to train. At offices supplied with trucks, matter to be forwarded must be loaded on trucks before arrival of trains, and trucks positioned so that they can be quickly drawn to trains.

"263. If consignee is an entire stranger and is unable to obtain personal identification, he must furnish conclusive evidence that the shipment was sent to him—first by correctly describing the contents thereof before shipment is opened—which latter must be done in presence of an employee effecting delivery, and second, by surrendering shipping receipt if in consignee's possession. If a trunk, bag or valise, he should be required to produce the key. If agent still has any doubt as to the party being the proper consignee, the goods must be held and superintendent notified, giving full particulars. Letters, postal cards or bank books should not be accepted as positive identification.

"622. Office Safes must be so located if possible as to be accessible only to the person authorized to use them, and if possible they should be placed out of the view of the public. The combination must be worked privately. When not in use, safes must be kept locked and the key removed or the combination completely thrown off. To insure their being locked, safes must always be tried after the key has been withdrawn or the combination thrown. A safe must not be left on what is known as the 'day lock'.

"624. Any employee entrusted with keys to safes, money drawers, etc., should carry such keys on a ring,
613 and must at all times keep them where they cannot be taken or used without his knowledge.

"692. Sealing Bags: Employees who are supplied with Porter Safety Seals must use them for sealing all bags containing money and valuables. These seals must be applied in accordance with special circular of directions issued to govern their use. When Porter Safety Seals are not available, bags must be securely stitched, tied and sealed with wax as follows:

"693. Double a piece of twine of sufficient length and pass the loop through the eyelet of the addressed tag to form a noose, through which pass the cut end of the twine, knotting same as close as possible to the tag. After plaiting the neck of the bag in four or more folds of not more than one inch each, wind the twine tightly several times around the neck, and after knotting if bag has no ringed eyelets, stitch through the plaits with a needle, one end above the encircling twine, and one below; if the bag has ringed eyelets therein, the twine must be passed several times through such eyelets, during the process of winding the twine around the neck of the bag.

"694. After stitching, or passing twine through ringed eyelets of bags so equipped, tie again and pass ends of twine through the tag eyelet to back of tag, sealing with wax over the twine exposed. Place another seal over the knot on the bag at the opposite side from the tag.

"891. Agents and platform employees are cautioned to see that trucks are always left a sufficient distance, never less than six feet, from the nearest track rail to prevent injury to anyone leaning from the train or passing along the platform between the tracks and trucks.

"Depot trucks must have one wheel chained or locked in a secure manner to prevent the possibility of truck drifting or being blown on tracks when unprotected.

"892. Station trucks must be pulled, not pushed, and when it is necessary to back them for any purpose employees must before doing so, assure themselves that no one is in the way.

"893. Trucks must not be wheeled close to car door until train comes to a full stop, and must be moved into the clear before train starts.

"894. Handles, unless provided with spring or counter-weight, must be hooked up when trucks are not in use. This to prevent persons falling over or colliding with them.

"1079. Weight should not be taken on dial scales until indicator hand comes to a complete rest.

> "1080. Dial scales should be so placed that reading of weight is in direct line with eye, otherwise reading is inaccurate.
>
> "1092. Safe doors should be closed gently; if they are slammed the tumblers may be dislodged, or the screws that hold them in position loosened.
>
> "1123. In Opening Pass Bags and other reusable wrappers, never turn the knife point or edge toward the bag."

The foregoing are only some of the rules and regu-
614 lations contained in Exhibit No. 8 evidencing the fact
that the Express Agency actually instructs to the minutest detail the persons subject to such rules and regulations as to how they should perform their duties. Another example of instructions relating to methods and details is found upon the back of the Form 95, quoted above in part, where the applicant for employment is required to agree to comply with the instructions shown on the reverse of that form, which instructions clearly relate to the method by which funds of the Express Agency are to be taken care of and not merely to the result to be accomplished.

The Express Agency contends that not all the rules and regulations are applicable to the joint agents. It stated in its oral argument, that its rules and regulations "were written so that they could be used, applied and followed to the extent which was necessary in the case of the individual connections which were made, the extent of the application of the rules depending on the nature of the relationship." (Transcript, p. 13.) However, at the hearing, in reply to a question as to whether the "General Rules and Instructions" referred to above apply also to joint agents, Mr. Hartung, General Solicitor of the Express Agency, stated as follows (Record, Page 30):

> "You will find when reading these regulations that in some instances they apply to employees and in other instances to agents. The rules explain themselves." (Underscoring supplied.)

Turning to the "General Rules and Instructions" (Exhibit No. 8) we find the following:

> "General Rules and Instructions include those Express Regulations which with authorized exceptions remain in force always, everywhere, and among all employees concerned. (P. 1.)
>
> "836. Employees exclusively in the service of this Company will not be permitted to give their time during business hours to outside matters. (Underscoring supplied.)
>
> "838. Employees exclusively in the service of this Company are prohibited from dealing commercially in any commodity carried by express, * * * (Underscoring supplied.)
>
> "839. (a) Employees not exclusively in the service of the Company, while not prohibited from dealing in commodities carried by express, will not be accorded any facilities which will give them an advantage over others.
>
> "(b) Non-exclusive employees are prohibited from acting as Agents or Sales Representatives of any Company or individual dealing in commodities carried by express, * * * (Underscoring supplied.)
>
> 615 "846. Employees are positively forbidden to solicit or influence consignments to be made to any particular person or concern; * * * (Underscoring supplied.)
>
> "1042. Every salaried agent or other official should maintain on card Form 1119 or book Form 5042, as required, a record of all personal property and equipment on hand received, transferred, retired or otherwise disposed of. Route Agents will maintain record of personal property at commission agencies." (Underscoring supplied.)

It is evident from the language of these rules and instructions that where there is intended to be an "authorized exception" the rule or instruction is expressly restricted in its application. Consequently, where there is no such express restriction and where the rule or instruction relates to the duties of an individual it follows that the rule or instruction applies to that individual, irrespective of whether or not he is a joint agent. For example, Rule No. 624 requiring "any employee" to carry keys on a ring; Rule No. 892, requiring that station trucks be pulled and not pushed; and Rules No. 692, No. 693 and No. 694, which instruct employees as to the manner in which bags containing money and valuables should be sealed, have no language restricting their application and relate to the duties of joint agents.

If it were not intended that the language of the rules and instructions and their relationship to the duties involved should determine the applicability of such rules and instructions, but that this should be determined, as contended by the Express Agency, from the "nature of the relationship" (i. e., whether the individual is a "servant" or an "independent contractor" as defined at common law), it would be practicably impossible for any individual in the service of the Express Agency to know which rules and instructions apply to him. Some explicit direction as to the applicability of the rules and instructions is necessary, if they are to accomplish their purpose. The one reasonable inference is that the language of each rule or instruction and its relationship to the duties of the individual constitute the only basis for determining the applicability of such rule or instruction.

Furthermore, the authority of the Express Agency is
not restricted to the issuance of formal rules and regu-
616 lations. If the authority of the Express Agency were
so restricted, it would not be able to issue a direction
to a particular agent with respect to a matter not covered
by the existing rules or regulations, without adopting and
issuing a formal rule or regulation. It is clearly imprac-
ticable for the Express Agency to issue a rule or regula-
tion with respect to every situation which may arise at

more than 16,000 agencies including situations which arise infrequently or which, having arisen once, may never recur. It is equally clear that the practical needs of the Express Agency's business, as described above, cannot be met if its power of control is confined to situations which may be expected to arise with such frequency as to warrant the issuance of a formal rule or regulation.

The following excerpt from the testimony of Mr. Owens, Vice President of the Express Agency, (Record, Page 53) shows that orders or instructions not in the form of a rule or regulation are, as a matter of fact, issued to joint agents by the Express Agency:

> "Q. Who gives orders to a joint agent: does the joint agent get his orders with respect to service for the Express Agency from the railroad or from the Express Agency?
>
> "A. That depends upon what it is that is involved. The minutiae, the details, is with the Route Agent of the Express Agency. (underscoring supplied)
>
> * * * * *
>
> "Q. But so far as his duties as an express agent are concerned, he gets his direction from the Express Agency?
>
> "A. That is right."

The Express Agency does not deny that it exercises control with regard to the manner in which the joint agents perform their service. However, it contends in oral argument on page 8 that this control is analogous to that in a case where a department store, for example, enters into a contract with a delivery service company for the delivery of packages, and "in that contract there are provisions made as to the hours in which deliveries are to be made, as to the manner in which these deliveries are to be made, as to whether the packages are to be handled without charges or upon the collection of the amount of the purchase * * * as to the collection of the amount of the pur-

chase * * * as to whether the packages may be left
617 if the person is not in, or whether it must be returned
to the store in such a case, as to whether the package may be returned if the person does not desire to accept it, * * *". The fundamental distinction between this case and that of the joint agent, is contained in the underscored words "in that contract". If a contract is made for the performance of certain work and if there are inserted in the contract provisions prescribing a specific method for doing the work, as in the department store case, the contractor does not agree to do the work in any manner the other party may see fit but in the particular manner agreed upon in the contract. The doing of the work in the prescribed manner is what the contractor undertakes to do and the manner or means of accomplishing this undertaking is left solely to the judgment and discretion of the contractor. The fact that the contract includes some specifications which happen to relate to the manner of doing work does not confer upon the party whose work is to be done any control whatever over methods and details because these specifications represent the mutual will of the parties and not that of either one alone. In the case of the joint agent, his undertaking is not merely to do the work in a specified manner in accordance with certain specific rules and regulations, but to do the work in accordance with any rules, regulations or instructions that the Express Agency may issue.

Another important difference between the cases is that the delivery company in the case described holds itself out to various stores as being engaged in the business of furnishing delivery service. Therefore, it is reasonable to believe that in contracting to perform the service for the department store it reserves the right to carry out the provisions of the contract in any manner it sees fit. On the other hand, the joint agent does not hold himself out to anyone as being engaged in the business of performing service of the kind which he agrees to perform for the Express Agency.

The Express Agency further contends that there are other factors in the case which indicate that these joint agents are "independent contractors" within the meaning of the common law and that they are therefore not
"employees" within the meaning of the Act. These
618 contentions are set out and discussed below:

(1) The Express Agency contends in its brief (Pages 20 and 21) that its transportation business is regulated by the Interstate Commerce Commission, that the rules and regulations which apply to joint agents "are necessary for the mutual benefit and protection of the agent and the Express Agency in making certain that both comply with the Law", and that, for this reason, the issuance of such rules and regulations does not indicate the relationship of "master and servant", at common law. In support of this contention, the Express Agency cites a ruling of the Bureau of Internal Revenue, dated December 8, 1937. I have been unable to find such a ruling under this date, but I have found a ruling of that Bureau, dated, December 6, 1937, which appears to be the one referred to. This ruling involved the status as "employees", under the tax provisions of the Social Security Act, of general and soliciting agents of a certain insurance company, who, under their written contract with the company, were to be governed, in the transaction of the company's business "strictly by the rules and instructions from time to time given by the Company." The Bureau's ruling contains the following language:

> "it is stated (by the Insurance Company) that the reference in the contract to 'Rules of and instructions from time to time given by such company' relate only to general rules and regulations; none are applicable only to a particular agent. It is stated that this

> phraseology is issued as a matter of mutual protection in the event of subsequent enactment of legislation at variance with existing contractual provision and does not give the company the right to control the agent in the manner in which his services are performed." (underscoring supplied)

The Bureau ruled that these agents are not "employees", but are "independent contractors", without any explanation other than the following statement: "On the basis of the Regulations and the facts presented it appears that the general agents and soliciting agents referred to above are independent contractors". On the other hand, with specific reference to the joint agents now under consideration, the Bureau of Internal Revenue, under the Taxing Act of 1935 held joint agents to be employees of Railway Express Agency. (August 11, 1936).

It is important to note in this connection that neither
619 under the language of the Railroad Retirement Act,
nor at common law are the reasons or motives for which control is exercised material to the determination of an individual's status. If this were not so, many individuals who, in fact, have no independence whatever with regard to the manner in which they do their work, would be considered independent contractors merely because the work done by them happens to be regulated by law.

Of course, if an individual is engaged under a contract whereby the employer's authority is limited to the issuance of only general rules and regulations pointing out the requirements of the law but does not extend to the issuance of rules or regulations specifying how the work should be done, in order to secure compliance with the law, such an individual might not be an employee under the Act. However, as shown above, the Express Agency does have the right whether or not actually exercised, to issue, if it see fit, any rules, regulations or instructions relative to methods and details of doing the work whether or not necessary to secure compliance with the law. It is evident that regulations such as those requiring the employees, including joint agents, to "carry keys on a ring" (Rule 624), requiring that "Station trucks must be pulled, not pushed" (Rule 892), requiring that "Safe doors should be closed gently" (Rule 1092), requiring that "in opening bags and other reusable wrappers, never turn the knife point or edge toward the bag" (Rule 1123), and the like, are not "general rules and regulations pointing out the requirements of the law" and furthermore are not necessary to secure compliance with any law or with any regulation of the Interstate Commerce Commission.

The ruling of the Bureau of Internal Revenue cited by the Express Agency, appears to be based on the above distinction. The above-quoted excerpt from that ruling shows that the insurance company did not merely contend that the purpose of issuing its rules and regulations was to secure compliance with law, but that its right to issue rules and regalations was restricted to the issuance of general rules and regulations and that it did not have "the right to control the agent in the manner in which his services are performed".

620 (2) The Express Agency contends in its brief (Page 18) that the joint agent is paid not only for personal services but also for the use of the railroad facilities "which the joint railway express agent has by reason of his employment with the railroad" and, therefore, that the contract between the Express Agency and the joint agent is "indivisible and clearly one 'for services' rather than one 'of services'." The term "contract for services" is used in a number of court decisions apparently to mean a contract to furnish something more than the personal services of the contractor, while the term

"contract of service" is used to mean a contract requiring only the personal services of the contractor, and the Express Agency contends that a contract which requires something more than the personal services of the contractor indicates the status of "independent contractor" as defined at common law.

In support of its position, the Express Agency cites the cases of *Western Indemnity Company* v. *Pillsbury*, 172 Cal. 807, 159 Pac. 721; *Tortorici* v. *Sharp Moosop, Inc.*, 139 Atl. 642, (Conn. 1927); *Fidelity and Casualty Company* v. *Industrial Accident Commission*, 216 Pac. 578; *Driscoll* v. *Towle*, 181 Mass. 416, 63 N. E. 922 and *Arne* v. *Western Silo Co.*, 242 N. W. 539 (Iowa 1932), which involved contracts which were held to establish the relationship of "independent contractor", rather than that of "master and servant." In the first four of these cases, the contracts in question were made by individuals who held themselves out to the public as being engaged in the business of furnishing the kind of services contracted for (except in the case of *Tortorici* v. *Sharp Moosop, Inc.*), the work under the contracts was to be done wholly at their own expense, the contracts did not require that the service be rendered in accordance with rules and regulations which may relate to the methods and details of doing the work, and the contracts required the furnishing of some service or facility other than, or in addition to, the personal services of the contractor himself. In the case of *Arne* v. *Western Silo Co.*, the individual whose status was in question was engaged as travelling salesman, on commission, was required to pay all expenses, could choose to work or 621 not work as he saw fit, his contract was silent as to "control", and the employer merely gave him instructions as to what was to be done, without telling him how it was to be done. All these cases are clearly distinguishable from that of the joint agent. This agent does not hold himself out to the public as being engaged in the business of furnishing service as an express agent, he does not perform his service for the Express Agency wholly at his own expense, his contract requires him to comply with rules, regulations and instructions which may relate to the methods and details of doing the work, the Express Agency gives him directions which relate to the methods and details doing the work, his contract does not require him to furnish the use of the railroad company's premises, and he is not free to refrain from working at any time he may see fit.

That the use of the railroad companies' premises by The Express Agency is obtained by The Express Agency itself by virtue of its own written agreement with the railroad company, to which the joint agent is not a party is shown by the following excerpt from Article IV of the "Express Operations Agreement" (Exhibit 1) between the Express Agency and the various railroad companies:

> "Sec. 1. In cases where an employee of the Rail Company acts as agent for the Express Company, the Rail Company, to the extent that it reasonably can, shall allow the Express Company the use of a portion of the station buildings now existing or which may hereafter be erected, including appurtenances and conveniences such as heat, light, and use of telephone at station without charge to the Express Company, except as otherwise provided in Section 2 of this Article, provided that the Express Company shall pay any additional toll charge made by the Telephone Company." (underscoring supplied)

Of course, it may be that the Express Agency does not get the use of the railroad company's premises unless it engages the railroad agent as its agent. However, this does not mean that the agent furnishes the use of the premises, but only that his employment by the Express Agency is a condition incidental to its securing the use

of the railroad's premises over which condition the agent himself has no control. The Express Agency contends that the joint agent may be said to furnish the use of the place to work because the railroad company, in per-
622 mitting the use of its premises for the business of the Express Agency, does so for its own benefit and that of the joint agent. However, in order to establish that the joint agent furnishes the use of the premises, it is not enough to show that the railroad company which owns and has control of the premises, by a partly influenced in granting the use of the premises, by a desire to benefit the joint agent; it must also appear that this agent caused the railroad company to make this grant. There is nothing in the record to show this, and the fact that the railroad company made a general grant to the Express Agency without reference to any particular joint agent shows conclusively that no particular joint agent was responsible for the making of the grant. Furthermore the Express Agency has shown by its own conduct that its arrangement with regard to the use of the railroad company's premises is with the railroad company and not with the joint agent. This is shown by the following excerpt from the testimony of Mr. Owens, Vice President of the Express Agency (Record Page 55):

> "Q. Do you ever, on occasions, establish an exclusive agency where previously there had been one of these joint arrangements?
>
> "A. That has been done.
>
> "Q. When that has been done did you give any notice to the joint agent?
>
> "A. That had to be done by the railroad company, his employer. The railroad company notifies him that the joint office is to be dissolved, and we take it up and establish an independent agency.
>
> "Q. There would be no direct contact between the Railway Express Agency and the joint agent?

> "A. The first move would be with the railroad; of course, in carrying out the change we would have to send a man there to check the joint agent out, and he would be advised—he would probably know before—the circumstances that caused the change to occur."

(3) The Express Agency lays great emphasis on the contention that it has no power to discipline the joint agents and, therefore, does not have that "complete control" which it states is necessary to establish the relationship of "master and servant" as defined at common law.

The Express Agency cites two cases, *Childers* v. *Com-*
623 *missioner of Internal Revenue*, 80 P. (2) 27, and *Western Indemnity Company* v. *Pillsbury*, 172 Cal. 807, 159 Pac. 721 for the proposition that "control", in order to establish the relationship of master and servant, at common law, must be "complete control." (Brief, Page 10). However, in neither of these cases is any reference made to the right to discipline or discharge, but the term "complete control" is used merely for the purpose of describing the kind of control which extends to the methods and details of doing the work, as well as to the results to be accomplished. The Express Agency further cites two other cases, *Texas and New Orleans Railroad Company* v. *Railway Clerks*, 281 U. S. 548, and *Railroad Retirement Board* v. *Alton Railroad Company*, 295 U. S. 330, for the proposition that the right to select and discharge and the right to demote and promote "are essential elements determinative of whether such control is as complete as required to establish the relationship of master and servant." (Brief, Pages 10 and 11). In the Texas and New Orleans case, the court's opinion stated that "the Railway Labor Act does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them", and in the Railroad Retirement Board case, the Court's opinion merely quoted the same statement. How-

ever, in neither case was the question as to the elements of "master and servant" relationship involved. (In the case of *McColligan* v. *Pennsylvania Railroad Company,* 214 Pa. 229, which is cited in another connection by the Express Agency on page 15 of its brief, the court did hold that the right to discharge "is incident to the relation" of master and servant.)

However, in this case, the Express Agency does have the right, and even the power to discipline the joint agents. The Express Agency denies this and illustrates its contention by referring to the case of a joint agent who was short in his account and whom the railroad refused to remove, and it states (Brief, Pages 12-13) "by reason of his employment with the railroad, the agent alone had the use of the facilities afforded by the railroad station for which the Express Agency made no payment other than the commission to the agent, and therefore the Express Agency continued its contract relationship with him following
624 restitution." Of course, the Express Agency cannot suspend or discharge a joint agent in the sense of suspending or discharging him from his work for the railroad company. However, there is nothing to prevent the Express Agency from suspending or discharging him with respect to its own work by taking this work away from him and having some other individual handle it either during the term of suspension or permanently after discharge. The Express Agency apparently takes the position that, merely because the suspension or discharge of a joint agent may carry with it the loss of use of the railroad company's premises, it has no right or power to suspend or discharge the joint agent with respect to his service for it. However, it is evident that the loss of use of the railroad company's premises is merely an extraneous circumstance which may affect the desirability of the Express Agency's exercise of its right and power to suspend or discharge, but which

does not constitute any limitation on such right or power itself. That the Express Agency does have such right and power is corroborated by the testimony of Mr. Owens, Vice President of the Express Agency, who testified as follows: (Record, Page 50)

> "Q. If the work was being improperly handled do I understand you to say that steps would be taken, possibly, to make a change in the personnel?
>
> "A. We would, of course, endeavor to have it properly handled—I referred to embezzlement—we would take the work away from him if the railroad company did not remove him.
>
> "Q. If you had an agent there who was positively inefficient and express shipments were not being handled carefully or in a proper manner, would the Railway Express Agency have authority to remove that individual and have someone else do the work?
>
> "A. We could get another contract agent.

Again (Record p. 46a):

> "Q. In the event you are unable to collect do you continue to have the express matters handled by that joint agent?
>
> "A. If the man is short in his accounts we take the agency away from him.
>
> "Q. And turn it over to some other individual?
>
> "A. Yes, we naturally wouldn't continue in our employ any habitual embezzler of funds."

625 Furthermore, it is clear that there is nothing to prevent the Express Agency from punishing misconduct or violation of rules or instructions by reprimand, or by the imposition of a fine, which could be collected by deduction from the joint agent's commissions.

The foregoing shows that the Express Agency does have complete right and power to enforce its authority to supervise and direct the manner of rendition of the joint agent's service by means usually available to any employer.

The Express Agency, in oral argument, (Page 10) admitted that the relationship between it and the joint agents may be terminated but stated that "every contract provides for a method of termination or cancellation. It may be upon notice or it may be without notice, but the relationship of master and servant may be discontinued by the act of the employer with cause or without cause, * * *." If this contention is intended to mean that the relationship of master and servant cannot exist unless there is in the employer an unconditional right to discharge the employee, with or without cause, then it would mean that every individual who is employed for a specified period of time or who is not subject to discharge without cause either by reason of a provision in his employment contract or by reason of a labor union agreement, could not be an "employee" even though the employment contract provides that the employer shall have the right to direct and supervise methods and details of every phase of his service. Manifestly, such a contention cannot be sustained.

The true distinction, in point of right to discharge, between the relationship of "master and servant" and that of "independent contractor" is that where an individual is an "independent contractor", his contract cannot, in the absence of a specific provision, be terminated by the employer merely because of his failure or refusal to do the work in the manner desired by the employer, whereas an individual who is a "servant" may, even in the absence of such specific provision, be discharged by the employer for such a reason. This is supported by the case of *Matter of Litts v. Risley Lumber Co.*, 224 N. Y. 321 cited by the Express Agency in oral argument in
626 support of its contention. At page 325, there appears the following statement:

"He (the contractor) was free to proceed in the execution of it (the work contracted to be done) entirely

> in accordance with his own ideas. He was not to any extent subject to the directions of the company in respect to the method, means or procedure in the accomplishment. He was not subject to a discharge by the company because he did the painting in one way rather than another. Those facts, considered by themselves would constitute him an independent contractor. In the relation of employer and employee, the employer has control and direction not only of the work or performance and its result, but of its details and method and may discharge the employee disobeying such control and direction." (Underscoring supplied)

It is notable that the individual in the above case was found to be an independent contractor not because he could not be discharged without cause but because he could not be discharged for doing "the painting in one way rather than another". Likewise, in describing the relationship of employer and employee the court did not state that the employer may discharge the employee with or without cause but that he might be discharged for disobeying control and direction as to the details and methods of doing the work.

Upon oral argument, it was the contention of the Express Agency (Transcript Page 11) that the termination of the relationship with the joint agent would be governed by the common law with respect to termination for breach. The record and the argument uniformly show that there is no express provision with respect to termination. Nevertheless, the testimony of Witness Owens (Record, Page 55) shows that, in practice, the arrangement may be terminated if it suits the business convenience of the Express Agency to do so, irrespective of any question of breach by the agent; and apparently the operation officials of the company have not been advised that in such terminations they would incur liability for breach of contract should they be unable to establish precedent breach on the other side.

(4) The Express Agency further contends (Brief, Page 27) that neither it nor its predecessors has exercised, or could exercise, any jurisdiction over the joint agent with respect to hours of labor, working conditions, promotions and demotions. This contention is apparently based on the facts that the joint agent devotes the major portion
627 of his time to service for the railroad company, performs his service for the Express Agency on the premises of the railroad company and performs this service within the same hours during which he is required to be available for railroad company service.

It is clear from the nature of the Express Agency's business that it must have the authority to require its agents to be on duty within certain hours. The fact that the working hours set by the railroad company cover the usual business hours may make it unnecessary for the Express Agency to make a requirement of its own with regard to those hours. However, this does not mean that it could not, if necessary, require the joint agent to be on duty during those hours. It is equally clear that the Express Agency has the authority to regulate working conditions, although it may not actually exercise this authority insofar as this is unnecessary by reason of the railroad company's regulations.

With regard to promotions and demotions, it is evident that, even if the Express Agency could not, and did not, make any promotions or demotions with respect to joint agents, this would by no means establish that they are "independent contractors" because, although the making of promotions and demotions normally accompany a "master and servant" relationship, it is not essential to that relationship. This is illustrated by the case of *Denton* v. *Yazoo and M. V. R. Co.*, 284 U. S. 305, cited in the brief of the Order of Railroad Telegraphers, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, in which case a porter of a railroad company assisted a United States postal clerk in loading mail, under the direction of the postal clerk, at short and irregular intervals. This individual was held to be the "servant" of the United States while assisting the postal clerk. Although the court did not discuss this point it is obvious from the circumstances of this case that it could not have been expected or intended that the porter would be promoted or demoted in the United States service.

Furthermore, there is nothing in the situation to prevent the Express Agency from offering a promotion in its 628 own service to the joint agent, nor to prevent that agent from accepting such an offer. Of course, if, in order to accept the promotion, the joint agent must leave the service of the railroad company, this is merely a circumstance to be considered by him in deciding whether or not to accept the promotion. Such a circumstance does not indicate a lack of authority on the part of the Express Agency to make promotions of joint agents.

The Express Agency can also demote a joint agent either by reducing his scale of compensation or by requiring him to accept a lower position in the Express Agency's service. It may be that there are no lower positions in the Express Agency's service at the particular point, and therefore that the joint agent cannot be demoted without transferring him to some other point which would require him to give up his railroad position; and the joint agent may prefer to leave the service of the Express Agency rather than accept such a demotion. However, this is merely an extraneous circumstance which does not affect the Express Agency's right to require him to accept the demotion if he wishes to remain in the Express Agency's service. It is evident that this right is the same as the right possessed by any employer with respect to his "employees".

The foregoing contentions of the Express Agency with respect to hours of labor, working conditions and promotions and demotions appear to grow out of the fact that the joint agent happens to be in the service of two employers during the same period of time and on the same premises and the consequent impossibility for each employer to exercise as much authority with respect to the employee's hours of service, working conditions, and other incidents of employment as if it were the sole employer. However, these are merely extraneous circumstances which affect the exercise of authority with respect to these incidents of employment.

(5) The Express Agency states that the joint agent is permitted to engage other individuals to perform or to assist in the performance of the work and to pay such other individuals out of his commissions, and the Express Agency contends that this indicates that the joint agent is an "independent contractor". In support of this contention,
629 the Express Agency cites the case of *Simonton* v. *Morton*, 275 Pa. 562, 199 Atl. 732 (1923) (Brief Page 14) and quotes in its brief (page 15) that portion of the following excerpt from the Court's opinion which is taken from 14 Ruling Case Law:

> "In the case at hand, it is conceded that the contractor employed, paid and had full power to control the workmen. This is one of the most important considerations in construing the contract to determine the relation of the parties. 'The control of workmen doing the actual manual labor in the performance of the work is an extremely important element in determining whether the employee is an independent contractor. The fact that the contractor employs, pays and has full power to control workmen is practically decisive of his independence.' 14 Ruling Case Law 71."

Although joint agents may in some instances delegate some of their work to individuals paid by them out of their commissions, such delegation is only by virtue of express permission granted by the Express Agency. Rule No. 820 of the "General Rules and Instructions" reads as follows:

> "No employee is permitted to delegate to another person any portion of his duties, unless authorized to do so by his superior officer."

In cases where an individual's power to employ and control assistants is considered to be indicative of his independence, such power is in the individual by reason of the agreement between him and the employer, and he may exercise this power without securing permission from the employer. The above-quoted Rule 820 shows that the Express Agency controls the delegation of work by the joint agents and that these agents do not have the power to delegate any of their work to assistants, except with the permission of the Express Agency. Since the joint agents do not have any power of their own to delegate work to other individuals, the mere fact that they may happen to make such delegation solely by virtue of authority granted by the Express Agency does not indicate in any way that they are "independent".

Furthermore, even if the joint agents did have power of their own to delegate work, this, although an important consideration, would be only a factor in the case, and would not be conclusive. This is shown by the above quotation from *Simonton* v. *Morton.* In cases cited by the Express Agency (*Simonton* v. *Morton, supra; Underwood* v. *Commissioner of Internal Revenue,* 56 F. (2d) 67; *Soderburg* v. *Atlantic Lighterage Corporation,* 19 F. (2d) 286, certiorari denied, 275 U. S. 542) where this factor was
630 given consideration in holding individuals to be "independent contractors", it also appeared that the contractors were engaged in business of their own, that they undertook to secure the performance of work in the course of those businesses, that the work to be done was of a kind and quantity which could not be expected to be done by the

individual himself, and that there were no express provisions in the contracts with regard to the authority to supervise and direct the methods by which the work was to be done. It does not follow that an individual, not engaged in business of his own, who is engaged to do work of a kind and quantity which he is expected to do himself, cannot be an employee merely because he is permitted in case of necessity, to engage someone on his own account either to assist him in the performance of the work or to perform the work on his behalf. If it appears from the agreement between him and his employer, in the light of all the other circumstances, that he is to perform the work by any method the employer may direct, he is an employee, within the meaning of the Act, at least while he, himself, is doing the work, regardless of his status with respect to work done by individuals employed by him, and regardless of the status of such individuals.

It is apparent that the joint agent is expected to do the work himself and is not expected to hire assistants except in occasional or rare instances. The Express Agency states in its brief as follows (Brief Pages 3-4):

> "At the larger places where the volume of business is substantial the express company has its own offices, facilities, equipment, and personnel, employing large numbers of persons to conduct those operations, but in the smaller communities where the business was limited in volume, in many cases being less than a shipment per day, in others not exceeding one or two or three shipments a day, it was not practicable or in the interest of good business to engage even one employee for the handling of that business. Consequently it became customary to make arrangements by contract with individuals who were engaged in other business and who could handle the small volume of express business as an incident to their regular business or occupation. This was done generally, on a commission basis, that is, by the payment of a percentage,

> most frequently 10 per cent, of the express charges on the individual shipments handled by them.
>
> "Owing to the fact that the railroad station usually
> represented the center of the business life of these
> smaller communities, that the time of the railroad
> agent was not fully occupied by his railroad duties,
> that he was familiar with transportation matters gen-
> 631 erally, and that the railroad companies did not object
> to its agent engaging in other activities, it became the
> more general practice for the express companies to
> arrange for the handling of the few shipments at such
> places by the railroad agent, arranging with him to
> act as agent and compensating him on a commission
> basis. * * *"

If the amount of work to be done was so little that "it was not practicable or in the interest of good business to engage even one employee for the handling of that business," it is evident that this joint agent could not possibly have been expected to hire assistants for the performance of the work, except in rare instances where there was some special reason for doing so. This is confirmed by the following excerpts from the testimony (Record Page 29):

> "Q. At some of these (joint railroad-express agencies) there more than one man?
>
> "A. (Witness Gross) There are very few occasions where he employs some other help. The Agency is generally represented by one man." (Underscoring supplied.)

Furthermore, as previously shown, the joint agents are required to perform their duties in accordance with any rules, regulations and instructions which the Express Agency may see fit to issue, including those which relate to the methods and details of doing the work. Under these circumstances, the mere fact that the joint agent may, in rare instances, employ assistants, is not sufficient to prevent him from being an employee. Any other view would mean that all individuals (including exclusive agents who admittedly are "employees" under the Act) who happen to delegate work on a few occasions to individuals whom they pay out of their own salaries or commissions, would not be "employees" under the Act, solely by reason of such delegation.

Whether the assistants who may be hired by the joint agent are employees, within the meaning of the Act, is another question which does not affect the status of the joint agents themselves, at least with respect to the service personally rendered by the joint agents subject to the continuing authority of the Express Agency to supervise and direct the manner of rendition of their service.

632 (6) The Express Agency also states (Brief, Page 27) that attention should be given to the facts that it has never extended to the joint agents the benefits of its pension plans or vacation plans; that it has not applied to these agents any increases or decreases in wages; that it has never included them in its pay rolls, but has allowed them to deduct their commissions from the express charges collected by them; and that it has never reported them to the Interstate Commerce Commission as employees.

A company may have a different policy with respect to various classes of its employees; it may extend the benefits of its vacation or pension plans to one group of employees and withhold the benefits of such plans from another group; it may grant increases or impose decreases of pay with respect to one group of employees and maintain a more uniform rate of pay with respect to others of its employees. However, such differences in treatment do not necessarily indicate that the individuals who are accorded different treatment in these respects are not subject to the same authority of the employer to supervise and direct the manner of rendition of their service as are the other employees. The difference in treatment may be due merely to the fact that one group is paid on a salary rather than a commission basis, that some are only part-time employees, and the like.

The fact that the joint agents were not included in the pay rolls but instead deducted their commissions from the express charges collected by them merely indicates that the Express Agency considered it desirable to pay them by having them deduct their pay directly from monies collected by them rather than by the more indirect process of having them transmit the full amount of their collections to the Express Agency and thereafter receiving a separate pay check from the Express Agency. As a matter of fact, this is exactly the same method of payment employed by the Express Agency with respect to the exclusive agents (who are also paid on commission) who admittedly are employees within the meaning of the Act.

The fact that the joint agents have never been reported to the Interstate Commerce Commission as employees does not necessarily indicate that the Express Agency did not
consider them employees under the regulations of the
633 Interstate Commerce Commission, because it may have
had some other reason for not reporting them. Furthermore, even if the Express Agency did not consider them as such employees, the question at issue is not whether they were so considered, but whether they were in fact subject to the continuing authority of the Express Agency to supervise and direct the manner of rendition of their service and this fact depends upon the agreement between the Express Agency and those agents, in the light of all the circumstances. Finally, it is doubtful whether the Express Agency did consistently regard the joint agents as not being "employees." The Express Operations Agreement (Exhibit No. 1) between the Express Agency and each railroad company contains, in Article XI, the following provisions:

"Sec. 1. The Express Company may arrange with the Rail Company for station and train employees of the Rail Company to act as agents and express messengers of the Express Company and to handle express at railroad stations, subject to the rules of the Express Company, * * * upon such terms as may be agreed upon by the two companies. (Underscoring supplied.)

"Sec. 2. In case any injury, loss or damage is caused by a joint employee while engaged exclusively in the service of one of the parties hereto, liability therefor shall, as between the parties hereto, be exclusively the liability of the party in whose service such joint employee was at the time engaged.

"In case it cannot be determined whether, at the moment, such joint employee was engaged exclusively in the work of either of the parties hereto, then the Express Company and the Rail Company shall jointly assume liability and bear the costs and expenses of settlement in the proportion in which the wages paid at the time of the injury by each bear to the total wages, and in such case no settlement shall be made by either party without the consent in writing of the other. (Underscoring supplied.)

"Sec. 3. Liability for personal injury to or death of any joint employees, when it can be determined that such injury or death was sustained while the employee was engaged exclusively in express service, shall be borne by the Express Company, and the Express Company shall bear all costs and expenses incident to the settlement thereof. * * * In case of injury or death, where it cannot be determined whether at the moment the joint employee was employed in work exclusively for the Rail Company or exclusively for the Express Company, the Express Company and the Rail Company shall jointly assume liability and bear the cost and expenses of settlement in the proportion in which the wages paid at the time of the injury by each bear to the total wages, in which latter case no

> settlement shall be made by either party without the consent of the other in writing." (Underscoring supplied.)

The Order of Railroad Telegraphers contends that the above-quoted provisions indicate a realization of the likelihood that liabilities normally incident to the relation of master and servant might ensue as a result of the
634 joint agent's service for the Express Agency. There is some merit in this contention. However, we cannot overlook the fact that these provisions are in a contract between the Express Agency and a railroad company with respect to which the joint agent is admittedly an employee. Consequently, references to the joint agent as an employee or as a joint employee and provisions safeguarding the railroad company against even a contention of liability with respect to injuries which might occur while the joint agent is in the service of the Express Agency, would be readily expectable, even though the relationship to the Express Agency were clearly that of an independent contractor. For this reason, no significance is attached to the above-quoted provisions in this report.

(7) The Express Agency also relies upon the fact that the principal occupation of a joint agent is that of agent for the railroad company, while his service for the Express Agency is merely incidental to his service for the railroad company. It is true that a joint agent spends relatively little time in service for the Express Agency, receives a relatively small amount of compensation for that service, and renders his service at irregular intervals during the same hours between which he renders service for the railroad company. However, the amount of service, the amount of compensation, and the regularity of intervals at which service is rendered, have no bearing upon the degree of the employer's authority to supervise and direct the methods and details of the service, while it is being

rendered. It is true that the joint agent has a certain discretion within a very narrow range to choose between rendering service for the railroad company or for the Express Agency. However, this is only because he has two employers at the same time. Such discretion is necessary for the proper operation of an arrangement for joint employment and, therefore, does not indicate that, while he is rendering service for one or the other of the two employers, he is not subject to its authority to supervise and direct the manner of rendering his service.

In support of its contention that the joint agents are employees under the Railroad Retirement Act, the Order of Railroad Telegraphers cited award No. 298, Third Division, National Railroad Adjustment Board, dated
635 September 17, 1936, in which it was held that the individuals who are hereinabove described as joint agents were employees within the meaning of the Railway Labor Act as amended. This decision was reached by a vote of 6 to 5 after a referee had been appointed to resolve a deadlock, and there has been much controversy as to the weight to be given to this award in this proceeding. In view of this controversy, and in further view of the fact that the record is sufficient to show clearly that the joint agents are subject to the continuing authority of the Railway Express Agency, Inc., to supervise and direct the manner of rendition of their service, no reliance whatever is placed on this award.

(b) Merchant Agent.

The other class of individuals rendering service to the Express Agency whose status as employees under the Railroad Retirement Act is at issue, consists of merchant agents who are engaged on a commission basis to represent the Express Agency in small communities and who conduct independent businesses as general storekeepers,

pharmacists, draymen and the like. These individuals were not represented at the hearing in this case and therefore the evidence with respect to their relationship to the Express Agency is less complete than in the case of the joint agents. However, it is a fact that these merchant agents sign the same "Application for Employment", including the same "Application for Fidelity Bond, etc.", and the same Form 95 as are signed by the joint agents. It is also established that they and the joint agents are usually paid the same rate of commission, are furnished with the same rules and regulations, and are to perform the same kind of work, which involves the same problems of securing compliance with the law and with the regulations of the Interstate Commerce Commission and with the regulations of each of the state Public Service Commissions, and fulfillment of the Express Agency's obligations to its patrons. The only factual differences between these merchant agents and joint agents is that the former are engaged in independent businesses of their own, rather than as employees of another company; that their service for the Ex-
636 press Agency is to be performed to some extent on
their own premises instead of on the premises of the railroad company; and that, with respect to their own businesses, they, themselves, set the hours and working conditions, while the joint agents, with respect to their railroad company service, have their hours and working conditions set by the railroad company. In view of the foregoing, it is clear that the merchant agents are in the same status under the Act as the joint agents, in all material respects.

Under the circumstances, it is reasonable to believe that the Express Agency would have no reason for entrusting, and therefore that it did not entrust, the merchant agents with any greater responsibility for devising methods and means of accomplishing the results desired by it, than that entrusted to the joint agents, unless there is something to show that it regarded the merchant agents as more expert, more trustworthy and more dependable in this respect than the joint agents. The fact that the merchant agents are engaged in independent businesses as grocers, pharmacists, draymen and the like, is no indication that they possess greater proficiency or skill with regard to the performance of the duties of express agent than do the joint agents. In fact, the probability is that the latter, with their experience in transportation service for railroad companies, are far more qualified to devise appropriate means and methods for performing the duties of express agents than are the merchant agents.

The case of the merchant agent is to be distinguished from that of an individual or company who, being engaged in an independent business of his own, agrees to perform service for another in pursuance of or as a part of his regular business. This is illustrated by the case described by the Express Agency in which a delivery service company undertook to perform delivery service for a department store. In that case, the delivery service company was in the independent business of performing exactly that kind of service which it agreed to perform for the department store and, therefore, could be presumed to have been especially proficient or skilled with regard to the manner of doing such work. It is evident that when such
an individual agrees to perform service of the same
637 kind as his regular business it is much more likely that
he is expected to devise the methods and means of doing the work and to be responsible only for the accomplishment of results. However, it is equally evident that, with respect to service outside the scope of an individual's regular business, the individual cannot be presumed to have any greater skill or proficiency than one who is not engaged in any independent business of his own. Therefore, the fact that the merchant agents are engaged in in-

dependent businesses which are wholly unrelated to the duties of an express agent is no indication that they have any greater degree of independence in their relationship to the Express Agency than do the joint agents.

The fact that these merchant agents set their own hours and working conditions with respect to their own businesses, and that their service for the Express Agency may be rendered between those same hours and under those same conditions, is no indication that they are not subject to the Express Agency's authority with respect to the methods of doing their work. If it appeared that the Express Agency had no authority to require them to be on hand during hours necessary to carry on the express business, (for example, to meet trains, and to receive and deliver packages) this would be a factor tending to indicate independence. However, there is nothing to show that the Express Agency does not have the authority to require the merchant agents to be on hand during such hours: all that appears is that it is unnecessary for the Express Agency to exercise any authority in this respect because the merchant agent is on hand for Express Agency duty by reason of the needs of his own business. The situation is substantially the same as in the case of the joint agent who is required by the railroad company to be on hand during certain hours and who is therefore available during those hours for Express Agency service.

The fact that the merchant agents perform part of their service on their own premises may be an indication of independence. However, this factor is outweighed by the other facts and circumstances described above which show that these merchant agents are not to be independent.

Part III.

Special Findings of Fact.

On the basis of the evidence and the whole record, I make the following special findings of fact:

1. The Railway Express Agency, Incorporated, (hereinafter, with its predecessor express companies, called the Express Agency) conducts in interstate and foreign commerce an express transportation business over the lines of all the principal railroad companies in the United States, except the lines of the Southern Railway Company and its affiliated carriers by railroad, by virtue of a contract with each railroad over whose lines its operates, which contracts are uniform in their terms, following a form known as the Standard Express Operations Agreement (Exhibit No. 1). The Railway Express Agency, Incorporated, is subject to Part I of the Interstate Commerce Act.

2. The Express Agency has in its service, among others, (1) individuals who render service as station agents, who devote all their time to the service of the Express Agency, and who are paid on a commission basis, which individuals are hereinafter referred to as "exclusive agents"; (2) individuals who perform service for a railroad company for which service they are paid by the railroad company and who also render service as station agents for the Express Agency for which latter service they are paid on a commission basis by the Express Agency, and which individuals are hereinafter referred to as "joint agents"; (3) individuals who differ from the joint agents described in (2) only in that they are compensated by a "fixed allowance"; and (4) individuals who render service for the Express Agency as station agents, who are paid on a commission basis, and who devote a substantial portion of their time to other non-railroad business such as that of gen-

eral store keeper, pharmacist, drayman, and the like, and which individuals are hereinafter referred to as "merchant agents".

3. The Express Agency, in the year 1936, had 20,159 offices throughout the United States; of these, 16,688 were offices where the station agents were joint agents, and
639 1716 were offices where some of the agents were exclusive agents and some were merchant agents. This situation has existed without substantial change (except in volume) at least since 1892.

4. The joint agents and merchant agents usually render their service in small communities where the express business is limited in volume, in many cases the average number of shipments handled being less than one shipment per day and in others not exceeding three shipments per day, with the result that it is not practicable or in the interest of good business to engage a full time employee for the handling of such business.

5. The premises on which the joint agents render their services for the Express Agency are the same as those on which they render their services for the railroad companies by which they are respectively employed. These premises are furnished to the Express Agency by these railroad companies under Article IV of the Standard Express Operations Agreement (Exhibit No. 1) which article provides for the use of railroad company premises by the Express Agency "in cases where an employee of the Rail Company acts as agent for the Express Agency".

6. The merchant agents render their services for the Express Agency on their own premises except insofar as is necessary to handle Express shipments to and from the railroad station or the railroad trains.

7. The exclusive agents are admitted to be "employees".

8. The exclusive agents, joint agents (whether compensated by commissions or "fixed allowances") and

merchant agents, when engaged to render service for the Express Agency, are all required to complete and sign the same forms, namely, Exhibits 10 and 11, in which forms they are all referred to as "applicant", "employee", "subscriber", and "agent", except that the exclusive agents are required while the joint agents and the merchant agents are merely requested to furnish personal photographs and statements of their employment records for the past ten years; and all three types of agent agree in writing to perform all of their duties for the Express Agency as required by the rules and regulations of that Agency.

9. In carrying on its express business, the Express
Agency is required to comply with laws and with regu-
640 lations of the Interstate Commerce Commission, all
relating to the express transportation business; must
meet obligations to its patrons; and must maintain harmony and cooperation with the operations of the railroad companies.

10. The Express Agency has from time to time issued sets of rules and regulations and supplements thereto (Exhibits Nos. 8 and 9). All these rules and regulations apply to joint agents and merchant agents, except those which are expressly restricted in their application to individuals other than joint agents or merchant agents and except those which do not relate to the duties of joint agents or merchant agents.

11. The Express Agency issues rules and regulations applicable to joint agents and merchant agents some of which rules and regulations specify the methods and details of doing the work and are not necessary to secure compliance with law or with regulations of the Interstate Commerce Commission.

12. The Express Agency also issues through its authorized officers or representatives, instructions to joint

agents, which instructions are not in the form of rules and regulations and which sometimes control the methods of doing the minutest details of the work.

13. Under their agreements with the Express Agency, as established by writing and all the circumstances, (hereinafter referred to as the agreement) the joint agents and merchant agents agree to render their services by any method which the Express Agency may direct.

14. The joint agents and the merchant agents do render their services for the Express Agency by such methods as the Express Agency does direct.

15. The joint agents and the merchant agents do not hold themselves out as being engaged in the business of furnishing to anyone the kind of service which they render for the Express Agency.

16. The agreement under which the joint agents render services for the Express Agency does not require them to furnish to the Express Agency the use of the railroad company's premises and the joint agents do not fur-
641 nish to the Express Agency the use of those premises.

17. The Express Agency is not compelled to engage an employee of the railroad company to serve as its agent who would, if so engaged, be a joint agent, but it is free to make any arrangement with any individual it sees fit for the performance of this work.

18. Under the agreement the Express Agency can suspend or discharge the joint agents or merchant agents for failure to comply with the rules, regulations or instructions by taking the work away from them temporarily or permanently.

19. Under the agreement and applicable regulations joint agents and merchant agents are not permitted to delegate to another person any portion of their duties unless specific permission to do so is received from the Express Agency.

20. The joint agents and merchant agents, are expected personally to render their services to the Express Agency and are not expected to delegate their work or any part thereof except in rare or occasional instances.

21. Joint agents, merchant agents, and exclusive agents are not carried on the regular pay roll of the Express Agency but receive their commissions by deducting the amount thereof from the express charges collected by them.

22. Under the agreement the Express Agency can, with respect to its own work, regulate the hours of work and working conditions and can make promotions and demotions.

23. All the foregoing facts have existed without substantial change except (in volume) at least since 1892.

Part IV.

Conclusions of Law.

On the basis of the whole record herein, the discussion of the evidence and the law, the special findings of fact,
and the provisions of the Railroad Retirement Acts of
642 1935 and 1937, I have formulated the following conclusions of law:

1. The Railway Express Agency, Inc., is a "carrier" under the Railroad Retirement Act of 1935 and a "carrier" and an "employer" under the Railroad Retirement Act of 1937, and was such a "carrier" and such an "employer" on August 29, 1935.

2. The individuals hereinabove described as (a) joint agents (whether compensated by commissions or "fixed allowances") and (b) merchant agents, while rendering service to the Railway Express Agency, Inc., are in a com-

mon-law master and servant relationship with the Express Agency.

3. These individuals are "in the service of" the Railway Express Agency, Inc., within the meaning of Sections 1(c) of the Railroad Retirement Acts of 1935 and 1937; they may be classified as "employees" under the Railroad Retirement Act of 1937; and they may also be classified as employees under the Railroad Retirement Act of 1935 if they were, on or after August 29, 1935, in the service of or in an employment relation to the Railway Express Agency, Inc., or were otherwise "employees" as defined in that Act.

4. The time devoted by those individuals to the performance of their duties for the Railway Express Agency, Inc., is creditable as service toward annuities under the Railroad Retirement Acts of 1935 and 1937 subject to the provisions of said Acts pertaining to the creditability of service toward annuities.

5. The foregoing conclusions of law Nos. 2, 3, and 4 apply to those Express Companies which were predecessors of the Railway Express Agency, Inc., in the same manner and with the same effect as to the Railway Express Agency, Inc.

Part V.

Recommendation.

1. I recommend that the foregoing conclusion of law No. 3 be adopted by the Board as the answer to Question 1, which question reads as follows:

643 > "Are persons performing duties for the Railway Express Agency in return for compensation on a commission basis, and who devote substantial portions of their time to other occupations, particularly railroad service, to be classified as employees under the Railroad Retirement Acts of 1935 and 1937?"

2. I further recommend that the foregoing conclusion of law No. 4 be adopted by the Board as the answer to Question 2, which question reads as follows:

> "Is the time devoted to the performance of such duties for the Railway Express Agency, or its predecessors, creditable as 'service' toward annuities under said Acts?"

3. I further recommend that joint agents compensated by a "fixed allowance," as distinguished from commissions, be held to be in the same category as joint agents.

Lester P. Schoene,
General Counsel.

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MINUTES OF MEETING
OF THE
RAILROAD RETIREMENT BOARD
HELD MARCH 24, 1938.

The Railroad Retirement Board met, pursuant to the call of the Chairman.

Chairman Murray W. Latimer, and Members J. A. Dailey and Lee M. Eddy were present.

The Chairman referred to the Board's order of October 28, 1937, directing the General Counsel to hold a hearing and to act as examiner for the Board, to receive arguments and to formulate findings of fact and conclusions of law, to enable the Board to make proper answer to the following questions:

> Are persons performing duties for the Railway Express Agency, in return for compensation on a commission basis, and who devote substantial portions of their time to other occupations, particularly railroad service, to be classified as employees under the Railroad Retirement Acts of 1935 and 1937? Is the time

devoted to the performance of such duties for the Railway Express Agency, or its predecessors, creditable as "service" toward annuities under said Acts?

The Chairman stated that he had received copies of the transcript of the record of the hearing, the transcript of the oral argument, the briefs filed by the respective parties, and on March 19, 1938 had received a copy of the examiner's report, including discussions of the evidence, findings of fact, conclusions of law and recommendation for decision. The Chairman further stated that he had examined all the documents referred to, had considered the entire evidence, the arguments of the respective parties, and the report of the examiner. Each member of the Board stated that he had received and examined the documents referred to by the Chairman, had given consideration to the entire evidence, the arguments of the respective parties and the report of the examiner. Mr. Eddy thereupon
645 moved that the Board render its decision upon the questions stated in its order of October 28, 1937, and that such decision be: (1) The Board approves and adopts the findings of fact made by the examiner; (2) The Board approves and adopts the conclusions of law reached by the examiner; (3) The Board adopts the report of the examiner as its opinion in the disposition of the matter; and (4) The Board decides the questions stated in its order of October 28, 1937, as recommended by the examiner in his report of March 19, 1938, formulating the following rulings with respect thereto:

(a) The individuals described as "joint agents" or as "merchant agents," while rendering service to the Railway Express Agency, Inc., are "in the service of" the Railway Express Agency, Inc., within the meaning of Section 1(c) of the Railroad Retirement Acts of 1935 and 1937; such individuals are therefore employees under the Railroad Retirement Act of 1937; and they are also employees under the Railroad Retirement Act of 1935 if they were on or after August 29, 1935, in the service of or in an employment relation to the Railway Express Agency, Inc., or were otherwise employees as defined in that Act; and

(b) The time devoted by such individuals to the performance of their duties for the Railway Express Agency, Inc., is creditable as service toward annuities under the Railroad Retirement Acts of 1935 and 1937, subject to provisions of said Acts pertaining to the creditability of service toward annuities.

This motion was seconded by Mr. Dailey, and, by unanimous vote, was adopted.

The Board directed that a copy of the examiner's report
be attached to the minutes and be made a part thereof.
(Exhibit No. 1123.) The Board further directed that each
of the parties entering an appearance at the hearing held
by the examiner be provided with a copy of the min-
646 utes (including the examiner's report), and that the
examiner's report, together with the rulings formu-
lated by the Board, be made available for general distribu-
tion.

Secretary.

651 EXCERPTS FROM THE MINUTES OF THE MEETING OF THE RAILROAD RETIREMENT BOARD OF MAY 31, 1938.

The Board met pursuant to the call of the Chairman.

Present:

Chairman Latimer, J. A. Dailey and Lee M. Eddy, Members.

The Board considered the letter of Mr. Albert M. Hartung, dated April 16, 1938, requesting an opportunity to present further evidence before the Examiner in Jurisdictional Docket No. 2, and thereafter to argue the case before the Board in banc. After full consideration of the matter, the Board entered the following:

ORDER.

It is hereby ordered and directed (1) that Jurisdictional Docket No. 2 be reopened with leave to all parties who have entered appearances in the matter to present further evidence and arguments before the Examiner on June 20, 1938, or such other date as the Examiner may fix to meet the convenience of all parties, upon the questions constituting the subject matter of the inquiry;

(2) That the evidence be directed so far as possible to the presentation of evidence not heretofore in the record, that repetition be avoided, and that argument be directed to new matters and toward such specific matters in the Examiner's report as are claimed to be in error;

(3) That particular attention be directed to the presentation of more complete evidence regarding the status of merchant agents;

(4) That decision be reserved upon the question whether argument before the Board in banc shall be permitted.

• • • • •

660 MR. PAUL GROSS, JR., a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hartung.

Q. Mr. Gross, you testified at the previous hearing in this proceeding?

A. I did.

Q. You have read the report as proposed by Mr. Schoene and are familiar with the fact that a further hearing has been authorized?

A. I have and I am.

Q. Have you prepared further testimony with particular reference to so-called merchant agents?

A. Yes.

Q. And including therein further evidence with respect to joint railway express agents?

A. That is correct.

Q. Will you proceed with that testimony?

A. At the hearing before this Board held at Washington, D. C., on December 15, 1937, there was introduced as Exhibit No. 15 a statement showing the number of joint railroad express agencies receiving varying amounts of commissions for the month of March, 1937. Included in this Exhibit were a number of agencies which, although the individuals representing the express company represented also the railroad companies, their activities were not confined to services performed for railroads and express companies. In other words, they are merchant 661 agents who serve the railroads as well as the express company and because they serve the railroads and the express company, we have generally considered them as joint railroad express agents.

Q. These men are agents for railroad companies, they are agents for the express company, and they are also engaged in some other business?

A That is right. But because they did serve the railroads and the express company, we consider them as joint railroad express agents, notwithstanding they had other activities. I have had prepared and submit herewith as Exhibit No. blank for the moment.

Examiner Schoene: Let's call it Exhibit No. 1 or 1-A.

Mr. Hartung: We will mark it Exhibit No. 1-A.

Examiner Schoene: Received in evidence.

(Railway Express Agency, Inc., Exhibit No. 1-A, Statement showing the number of Merchant Agents, who serve the railroads and Express Agency, receiving varying amounts of commission for the month of March 1937, received in evidence.)

Q. Will you describe that, Mr. Gross?

A. The Exhibit is marked as a Statement showing the number of Merchant Agents, who serve the railroads and Express Agency, receiving varying amounts of commission for the month of March 1937.

Examiner Schoene: Mr. Gross, I understand from your previous testimony that all individuals referred to here, in addition to serving the railroad companies and Express Agency, are also engaged in some other business?

A. That is correct as to this Exhibit and those included in the former Exhibit as joint railroad agents. They serve the railroad and the express company.

Mr. Hassenauer: Which means handling insurance on the side as testified previously and such other business in the way of grocery store, merchant or filling station?

A. I will take care of that in another exhibit. This statement showing the number of merchant agents who serve the railroads and the Express Agency is prepared in the same manner in which Exhibit No. 15 was pre-

pared and submitted in the first hearing of this case to
662 show the number of agencies receiving varying
amounts of commission for the month of March, 1937, the Exhibit showing also the percentage of total number of offices receiving the varying amounts of commissions and the accumulated percentages. It shows, for example, that of the 387 agencies of this kind, 147, or 37.98 per cent received commissions of $1.00 and less; that 82 agencies, or 21.19 per cent received commissions of more than $1.00, but not more than $2.00. It shows further that 59.17 per cent of the agencies received commissions in amounts not over $2.00; that 86.56 per cent of the agencies received commissions of $7.00 and less. As to this group of agencies compared with all joint railroad express agencies included in Exhibit No. 15 the average amount of commission per agency is substantially less than for other joint railroad express agencies, that is, whereas in Exhibit No. 15, 45.89 per cent of the offices were shown to have earned commissions of $5.00 and less per agency, as to these merchant agents who served the railroads and the express company 80.36 per cent earned commissions of $5.00 or less. Exhibit No. 2-A, consisting of two sheets, was prepared and is submitted to show the other activities of merchant agents who serve the railroads and the Express Agency by the various classes of their activities. I submit this Exhibit. It shows on line one that there were 25 of such agents who conducted general stores in addition to serving the railroads and the Express Agency, that there were 27 housewives representing the railroads and the Express Agency. On line six are shown 25 postmasters and postmistresses. Line ten shows that 12 of the agents conducted automobile agencies, service stations, garages and repair shops. Various other kinds of stores were conducted by the agents and are indicated on lines 11 to 17 inclusive. In a number of cases the railroads and the

Express Agency were represented by employees of stores, such as are indicated on lines 19 and 21. The statement shows 40 classifications of outside activities of individuals or companies who serve the railroads and the Express Agency. On this statement has been extended also the amount of commission paid in the various classifications for the month of March, 1937. I offer that statement as Exhibit No. [illegible]A.

663 Examiner Schoene: Received in evidence.

(Railway Express Agency, Inc., Exhibit No. 2-A (2 sheets) Statement showing the number of Merchant Agents, who serve the railroads and Express Agency, by classes, indicating their outside activities and their compensation for the month of March 1937, received in evidence.)

A. Exhibit No. 3-A shows the number of Express Merchant Agents who do not serve the railroads, who are occupied in various activities and who incidently serve the express company. This Exhibit shows there were 1,082 agencies of this kind. It shows also the number of agencies receiving varying amounts of commissions for the month of March, 1937, and the percentage of total number of agencies in each bracket as well as the accumulated percentages. It shows that 163 agents, or 15.07 per cent received commissions of $1.00 and under; that 98, or 09.06 per cent received commissions in amounts over $1.00 and not over $2.00, and that 24.13 per cent received commissions in sums not over $2.00. It shows that 41.68 per cent of the agencies received commissions of $5.00 and less; that 50.27 per cent of the agencies received commissions of $7.50 and less. A comparison of the accumulated percentage in this Exhibit with the accumulated percentage shown in Exhibit 15, shows that whereas in this Exhibit 50.27 per cent of the agencies received commission of $7.50 and less, in Exhibit 15, 57.07 per cent of the agencies earned commissions of $7.50 and less. This comparison indicates that the average amounts of commissions earned by the express merchant agents is greater than for the joint railroad express agencies included in Exhibit 15.

Mr. Hartung: I offer this statement as Exhibit No. 3-A.

Examiner Schoene: Received in evidence.

(Railway Express Agency, Inc., Exhibit No. 3-A, Statement showing the number of Express Merchant Agents, who do not serve railroads, receiving varying amounts of commission for the month of March, 1937, received in evidence.)

A. Exhibit No. 4-A, statement of three sheets, shows the number of express merchant agents who do not
664 serve the railroad companies, showing by classes the number of agents and their outside activities, also the compensation which they received for the month of March 1937. It shows on line one that there were 180 agents conducting general stores, that 12 agents were companies conducting trucking, drayage, bus and [illegible] service, 42 were individuals performing the same kind of service, and in the case of 64 agents it was not known specifically whether they were individuals or acting as companies. Thirty-one farmers acted as agents of the express company, twenty-six housewives and sixty-seven postmasters and postmistresses. On the succeeding lines 8 to 19 are shown individuals who hold public office or who are employees of public departments and serve the express company as merchant agents. Fifty of the merchant agents conduct automobile agencies, service stations, garages and repair shops. Lines 21 to 42 inclusive show agencies conducting various kinds of stores specifically mentioned. Employees of coal concerns, employees of stores and other out-side concerns are shown on lines 44 and 45. Fifty-three employees in each classification are shown to represent the express company. In this statement, 87 various activities of merchant agents who serve the express company have been enumerated.

Mr. Hartung: I offer that statement in evidence as Exhibit 4-A.

Examiner Schoene: It may be received in evidence.

(Railway Express Agency, Inc., Exhibit No. 4-A, (3 sheets) Statement showing the number of Express Merchant Agents, who do not serve railroads, by classes, indicating their outside activities, and their compensation for the month of March, 1937, received in evidence.)

A. At the earlier hearing before this Board, the question was raised as to the reason for selecting the month of March, 1937, for the preparation of statistics as to the amount of commissions earned. It was explained that the months of March and October were the principal tariff months in the express service and the purpose in this case of selecting the month of March, 1937, is that month would reflect the amounts of commission earned during the months of the year in the most favorable light. 665

I have had prepared and submit as Exhibit No. 5-A a statement showing by months for the year 1937 the total charges for transportation of the Railway Express as reported monthly to the Interstate Commerce Commission and the ratio which the total charges for transportation in each month bear to the total charges for transportation for the year. The average for the month, dividing 100 per cent by 12, would, of course, be 8⅓ per cent. The statement is self-explanatory. It indicates the month of March bears the highest ratio above the average for a month specifically. It shows for the month of March 1937, the charges for transportation amounted to $14,860,837.15, or 09.24 per cent of the total charges for the year.

Mr. Hartung: I offer that statement as Exhibit No. 5-A.

Examiner Schoene: It may be received in evidence.

(Railway Express Agency, Inc., Exhibit No. 5-A, Statement showing total charges for transportation by months for the year 1937, and ratio which the total for each month bears to the total for the year, received in evidence).

A. In order to clear up an apparent misunderstanding with regard to report of service and compensation of employees of the Express Agency to the Interstate Commerce Commission, the report to the Commission provides specifically for the classes of employees to be included therein. And in addition to showing the number of employees in each class, the express companies are required also to furnish information as to the number of straight time and overtime hours and compensation for straight time and overtime. The classes of employees reported are those for which separate operating expense accounts have been provided in the classification of accounts provided by the Interstate Commerce Commission. Payments to commission agents are included in a separate operating expense account and express companies are not required to include compensation to commission agents in the separate statements of employees' service and compensation which must be filed monthly and annually with the Commission. It would be impossible to include in such statements the 666 hours of service of commission agents as no record of their hours of service is maintained. Obviously the express companies are complying with the reporting requirements of the Interstate Commerce Commission and have no reason for not reporting joint railway express agents or merchant agents as employees except that they have not considered such agents as employees and in the form of statement of employees' service and compensation the Commission has not considered such agents as employees. A review was made to develop the reason for engaging merchant agents to represent the express company. The reasons found were many. Of the 1082 merchants referred to hereinbefore, 502 agencies of the express company were at some time represented by an individual also representing the railroad company. In the majority of those cases, merchant agents were engaged by the Railway Express Agency after the railroad agencies were discontinued. In some cases the railroad agents were unable to provide pickup and delivery service, or for some reason they could not handle express traffic. In some cases railroad agents were not interested in handling express traffic. In some cases the railroad offices were so far removed from the business section of the locality. Many other reasons were the causes of the discontinuance of the joint arrangements. Where at some time the arrangement had been joint, it was found there were no railroad agents and in some cases, no railroad service. In some cases railroad agents have refused to handle express traffic. In many cases merchant agents were engaged to provide satisfactory and convenient service to our patrons.

Cross-Examination by Mr. Hassenauer.

Q. Taking your Exhibit No. 2-A, Mr. Gross, will you tell us what you mean by the term, "serve," as used by you in the heading of your exhibit when you say "serve the railroads and express agency" as regards merchant agents?

A. They represent the railroads and the express agencies.

Q. Just what do you mean by that, Mr. Gross?

667 A. They may be the agent of the railroad; they may be employed by the railroad in some other capacity.

Q. For example?

A. They may be a caretaker; in short, I would say that they represent the railroad at that particular point in some point of the railroad service.

Q. Can you be more specific about the nature of their duties when you say they represent the railroads?

A. I would say in most cases the agent of the railroad company sells tickets, or in other ways serves as an agent would serve.

Q. For example, on line 24 of your Exhibit, you have stated that there are two hospitals or sanitariums whose employees serve the railroads and also are merchant agents of the express agency.

A. That is right.

Q. Can you give a specific instance in which the hospital or sanitarium in some capacity is also serving the express agency?

A.

Q. Just what does that service amount to?

A. I would have to go into more detail or make some further inquiry. They are merely selling tickets for the railroad, acting as the agent for the railroad company in selling tickets.

Q. You are not specific about that.

A. I am not prepared to be specific about that now.

Q. You do not have the information now?

A. Not at this moment.

Q. Does that also apply to Item No. 29 as to the undertaker?

A. That is correct.

Q. And Item No. 39 as to the packing plant?

A. That is correct.

Q. And the dancing instructor, Item No. 40?

A. That is correct.

Q. Now Item No. 6 with respect to postmasters and postmistresses, do you mean to say that they are also engaged or retained or employed by a railroad company?

A. That is correct.

668 Q. In what capacity?

A. As to postmasters and postmistresses, they were practically all agents of the railroads.

Q. What did their duties consist of?

A. All the duties attached to the position of the agent of the railroad company.

Q. Under what circumstances?

A. We know of cases where the postmasters live right in the station and conduct all the operations of the railroad company, as well as the express company.

Q. Do those stations have any telegraph service in those instances when postmasters and postmistresses are engaged in the service of the railroad?

A. They may have.

Q. Do you know of any instances when they do have?

A. I did not inquire particularly into their service with the telegraph companies, but generally that is so.

Q. You have Item No. 17 indicated here as eight nonspecified agencies. What group did they consist of?

A. Stores of some kind. Retail stores.

Q. Item No. 22 you also have here included employees in the mail service, and you indicate that there are seven such employees engaged in railroad service. Do you know of any specific instance where mail carriers are also serving the railroad company and express agency?

A. I know of several such cases.

Q. Can you tell us where they are?

A. I can if I am given the time to refer to details.

Q. Do those mail carriers and messengers refer to men engaged in rural free delivery service, or do they refer to mail carriers on trains?

A. They do not refer to mail carriers on trains.

Q. In all of these instances, does it not require the permission of the railroad company before any of these individuals representing the railroad company carry on service for the express agency?

* * * * *

669 A. I do not understand the question.

Q. In these instances which you specified in Exhibit 2-A, did these persons as individuals or operating as a corporation or as partnerships or associations represent the railroad company prior to their being engaged by the Railway Express Agency?

A. I cannot say as to that. It is a situation as it existed in March, 1937.

Q. Are any of these listed on Exhibit 2-A employed as railroad station agents?

A. They are.

Q. Will you point out specifically those instances?

A. I cannot specifically at this time without going into details.

Q. Will you give us approximately how many of these various items on here are engaged as railroad station agents?

A. I would say the majority here.

Q. Approximately what is the population of the towns in which these agencies are located, as specified on Exhibit 2-A?

A. I did not examine into the population of those localities, but I would say the population is small.

Q. Small cross-road stores and country towns?

A. I would say that they were relatively small places and small towns of low population. If they were any size, we would not have that kind of arrangement.

670 Q. What arrangement would you have then?

A. If our business were large enough, we might have our own employees. If the town is large enough, we would employ our own full time agent.

* * * * *

671 By Mr. Schreiber:

Q. Referring to Exhibit 2-A, on page two, lines 31, 38 and 39, you have restaurant, cooperative colony, and packing plant. Do your records show a particular individual in each of these classes, or do you show merely restaurant, cooperative colony, or packing plant? Is the proprietor of the restaurant or proprietor of the packing plant, or manager of the cooperative colony listed as your agent?

A. Our records show that it is some individual of the restaurant, cooperative colony, or packing plant. It may be the owner or an employee of the restaurant. The agency is not necessarily in the name of the establishment.

Q. If it should be necessary to develop more evidence in connection with these general items or any other items in Exhibit 2-A, would you be in a position to identify the place of business and the community?

A. We would be.

Q. You could also name the justice of the peace or the sheriff on page one of the Exhibit?

672 A. That is correct.

Q. I would appreciate, Mr. Gross, if you would tell us something about merchant agents with respect to the service they perform, that is, do these merchant agents perform their service for the express agency on the premises of the express agency, or on the premises of the railroad, or on their own premises?

Mr. Hartung: Mr. Gross may be able to give you that information, but we are calling other witnesses who will be able to give you this material.

Q. In other words, you have a large number of merchant agents. Could you break that down to show how many are performing on express agency premises, on railroad premises, and so forth?

A. Yes.

Q. Are you in a position to tell us whether in the performance of these services, these merchant agents use their own equipment or facilities, or tools, or the express agency's tools, or the railroad's tools?

A. That could be developed.

Q. And as well as a description of the particular services performed by the various groups? That could be done?

A. You mean service for the express company? That is practically identical. They are all the same type.

Q. Would you state for the record just what that service is?

A. Briefly, it is the handling of the express traffic, which embodies the receipting for express shipments and delivery of express shipments, the handling to and from trains, and making the necessary reports of those transactions. That is substantially all the service covers.

Q. Just one more question about the word "service". I want to develop one thought mainly. Is it your intention to imply that, in the rendition of this service for the railroads, these merchant agents are independent contractors, and that they are also contractors for the express agency, or are you merely using the word in its general sense without any significance?

A. They are merely performing a service for the railroad company, and they act as our agents and have other outside activities.

673 By Examiner Schoene:

Q. I would like to ask you just one question. I believe you testified that you were not required by the Interstate Commerce Commission to report the service and wages paid to merchant agents.

A. That is correct.

Q. Do you have any specific ruling on that from the Commission, or is that simply the conclusion that is drawn from the fact that you have not been reporting them?

A. The Commission prescribes the form to be used in making reports each month and for the year, and the term or title of that form is as shown in Exhibit 13 produced at the previous hearing and is called "Statement of Employees' Service and Compensation for the Calendar Year 1936".

Q. It is the term "employee" that forms the basis of your statement that you are not required to report?

A. That is correct, and there is no provision in that statement for including commissions paid to agents, nor would it be possible for us to report as to commission agents straight time hours or overtime hours or compensation for straight time or over-time hours.

By Mr. Schreiber:

Q. In this connection, did you ever ask the Interstate Commerce Commission to supply you a different form, if possible, or did you call their attention to the fact that the form was not made up to fit the particular circumstances?

Mr. Hartung: I object to the form of that question. I see no reason why the company should make such a request since the Commission's form describes the nature of the information which it desires, and the information which it desires is naturally within the service performed by the express agency or by independent contract, and therefore, there would be no occasion for any such request.

Mr. Schreiber: It is a fact, though, that the Commission never passed upon the question?

Mr. Hartung: Yes.

674 Q. Are you reporting merchant agents to the Commission?

A. Not separately.

Q. Do you include them on this form where the word "employee" is used?

A. No.

* * * * *

By Mr. Hassenauer:

Q. As I understand you, the payment of commissions to commission agents is reported in the form of expense accounts in the report to the Commission?

A. That is correct.

* * * * *

MR. WALTER H. HUFF, a witness introduced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hartung.

Q. Mr. Huff, where do you reside?

A. Baltimore, Maryland.

Q. What position do you hold with the Railway Express Agency?

A. Superintendent, Maryland, Pennsylvania Division.

Q. Describe briefly what territory this embraces.

A. It includes practically the entire western portion of the State of Maryland, the center of Pennsylvania, up through Williamsport, that area and portion of the State of West Virginia, in the neighborhood of Elkins and portion of Virginia near Winchester.

Q. Will you state briefly your express experience, Mr. Huff?

A. I have over thirty-four years of experience, hav-
675 ing been a clerk, chief clerk, agent, assistant senior
agent, route agent, superintendant for the State, first with the Adams Express Company and then with the American Railway Express in 1918, the time of the consolidation of the old express companies, and now with the Railway Express Agency.

Q. You have been in charge of your present territory how long?

A. Six years, seven years.

Q. You have heard the testimony of Mr. Gross given this morning with respect to so-called merchant agents. Do you have and have you had merchant agents in your territory?

A. Yes, I have merchant agents in my present territory and there have been merchant agents in the Railway Express Agency service ever since I have been connected with the business.

Q. Do you also have joint railroad express agents in your territory? Has it been customary to have such agents in the service of the various express companies with which you have been connected?

A. Yes, I have about 350 now. It has been a general practice in the business ever since I have been connected with it to use joint railroad express agents, particularly in the smaller communities, where the volume of business is too small to justify the use of express employees.

Q. Mr. Huff, have you prepared a statement of the merchant agents in the Maryland-Pennsylvania Division over which you now have charge?

A. I have.

Q. I hand you statement of the merchant agents headed, "Merchant Agents in Maryland Pennsylvania Division."

A. That is correct.

Q. Was that prepared under your direction and is it correct?

A. Yes.

Mr. Hartung: I offer this statement as Exhibit Number 6-A.

Examiner Schoene: Received in evidence.

(Statement headed "Merchant Agents in Maryland-Pennsylvania Division", Exhibit No. 6-A, received in evidence.)

Q. Mr. Huff, did you review that exhibit and take up

some of the individual cases therein and could you tell us
the nature of the business in which these business-mer-
676 chant-agents are engaged, where their places of busi-
ness are located, with particular reference to the rail-
road stations, the amount of express business they handle
and such information generally as you think will be help-
ful in this matter?

A. Starting at the top of the list, Alberton, Maryland, is a point on the Baltimore & Ohio Railroad, where we have been represented for a number of years by a general store keeper located right across the road from the station. The amount of business done there is very small, but he has retained the agency for the benefit of his customers and it is an added selling point perhaps for his store. Going to Bedington, West Virginia, we are represented by a housewife, a Mrs. Butts, who is the wife of a railroad section hand. In 1933, the railroad company closed its ticket office at Bedington, West Virginia, and because of the desire to render service to a large shipper of water cress, we contracted with Mrs. Butts to represent us. Her home is located perhaps a block from the railroad station and, as before stated, most of the business is water cress brought to her by one particular shipper. She cannot load the business entirely by herself, so she calls on her children and sometimes on her neighbors to assist her in handling that business.

Q. I notice, Mr. Huff, in May, 1938, there were 1,199 shipments. Is that business seasonal, so that it might be larger than during other months of the year?

A. May is one of the best months with water cress in that area. The season lasts four or five months in the year.

Q. During the other months of the year, the majority of the business is general express business?

A. Yes, and the volume is very small.

Q. Do you wish to say anything about this agency?

Examiner Schoene: May I interrupt? Mr. Huff testified that a contract was made with Mrs. Butts. I am not sure whether you are prepared to testify as to the nature of this contract—whether you wish it to be understood that the contract is the same type which has been described in the previous hearing or whether you want to introduce that in your testimony.

677 A. The contract was verbal. The arrangements were made by the route agent who called on Mrs. Butts and offered her a commission of 10 per cent on the express business, I think up to $500 a month, and 5 per cent beyond, without a limit.

Examiner Schoene: Did she enter into or did she sign the documents known as application for employment, and was she checked in in the usual manner? You are familiar with the regular application for employment?

A. Yes, she signed that.

Examiner Schoene: She signed that same instrument and the record of the cash and materials, etc., was made in the usual form, it that right?

A. When the account was transferred over to her, yes.

Examiner Schoene: I wanted to make the record complete.

Q. Was she provided with a set of official transportation tariffs?

A. Yes, a set of transportation tariffs, a set of scales and a couple of 4-wheel trucks in order to handle the business.

Q. A copy of the rules and regulations?

A. A copy of the rules and regulations.

Q. Is a copy of the rules and regulations part of the set of documents which is provided to all agents, together with the tariffs?

A. Yes.

Q. Is it essential to know the provisions of the rules and regulations insofar as they relate to express business and in order to carry out the tariffs?

A. That is correct. And take the case of Chase, Maryland, as another little example of an unusual situation. A railroad company closed its office there on October, 1935, and we employed a store-keeper who looks after our business on a contract basis, and works, himself, in the Eastern Rolling Mills on the outskirts of Baltimore while his wife runs the store for him during the day. She and her children met the trains.

Examiner Schoene: In that instance, Mr. Huff, the arrangement was between the husband and the Express Agency, but the husband works in the Rolling Mills and the wife, in fact, carries out the duties?

678 A. But the husband makes the reports at the end of the month and he is responsible for the cash, etc.

Q. The wife and children perform the physical work of handling the express business?

A. That is correct.

Q. Do you have any more about Chase?

A. No. Another example is a housewife at Elliottsburg, Pennsylvania, East Broad Top Railroad and Coal Company. The Railroad Company has not maintained an agency there for a great many years and this woman's husband at one time represented us, but he did not want to do it any more, so his wife took over the work in July, 1928, and the husband provides a storage space for any express matter which might be held on hand in his warehouse, as he runs an implement store, but the wife conducts all other business at her home, receipting for the business, making reports, etc.

Q. Will you take the next case?

A. At Greenmount, Maryland, on the Western Maryland Railway, we have been represented by a joint storekeeper and postmaster, if I may term it so, since April,

1927. That man runs a general store, selling practically all kinds of articles from clothing to ice cream and gasoline, and he also has in the corner of his store a little post office. I made a trip up there the other day and made a photograph of his place, which might give you an idea of how it looks.

Mr. Hartung: I offer that in evidence. That is Greenmount, Maryland.

Examiner Schoene: I will identify that as No. 7-A.

(Photograph, 2¾"x4½", EXHIBIT NO. 7-A, with identification pasted on bottom "Railway Express Agency—Greenmount, Md. (Western Maryland Railway) J. A. Dehoff, Agent—Gen'l. Store-keeper & Postmaster", received in evidence.)

Q. I notice what appears to be a sign on the side of that building. It is not very clear. What does that say?

A. Railway Express Agency.

Q. Have you anything more to say about that case, Mr. Huff?

679 A. No.

Q. Take up the next one.

A. The next represents a different situation, too. Greenmount is directly across the street from the railroad station.

Examiner Schoene: May I ask one further question. I take it the loading is done from this little platform visible here, or is the express shipment taken across the street to the station?

A. Taken across the street. Shipments received on trains inbound are carried over to the store for delivery and outbound business is carried across the street to the station for loading on the trains. Glen Burnie, Maryland, is an office on what we call Annapolis Truck Route. It was formerly served by the Washington, Baltimore and Annapolis Railroad and the Southeastern Express Company, which withdrew from that service in August, 1935.

We had been operating a truck between Baltimore and Annapolis over the road and we arranged to open an agency at Glen Burnie. This agency is with a garage owner and battery repair man and is located adjacent to the Washington, Baltimore and Annapolis Railroad, but, of course, the railroad is not used, as the over-road truck line serves that particular office and delivers the business direct to the office and it is taken away from the office.

Q. Did you take a picture of that place of business also?

A. I did, sir.

Q. Does this picture represent the situation?

A. It does.

Mr. Hartung: I wish to introduce this in evidence as Exhibit No. 8-A.

Examiner Schoene: Received in evidence.

(Photograph, 2¾" 4½", EXHIBIT NO. 8-A, with identification pasted on bottom "Railway Express Agency—Glen Burnie, Md. (Annapolis Truck) Robt. G. Benson, Agent—Garage Owner", received in evidence).

A. The next rather unusual situation is Henryton, Maryland, an office on the Baltimore & Ohio Railroad, where we are represented by a clerk in the State Hospital for colored tuberculosis patients. The business con-
680 sists principally of shipments to and from the patients
of the hospital and the office is located perhaps a block or so from the railroad station.

Q. Who handles the business there, Mr. Huff?

A. A. R. Swankhaus, a clerk in the State Hospital.

Q. Does he perform the service himself?

A. He does all the work himself. Now at Hokes, Pennsylvania, we are represented by a store-keeper and miller and have been since June, 1930, when the railroad company withdrew its agent from that point. Mr. Hohf, the agent, conducts a milling business in the rear of his general store, which is adjacent to the railroad station, but perhaps half a block away.

Q. Do you have a photograph also of that place of business?

A. I took it also.

Q. That is a correct representation of the situation?

A. That is correct.

Mr. Hartung: I wish to introduce this in evidence as Exhibit No. 9-A.

Examiner Schoene: Received in evidence.

(Photograph 2¾″x4½″, EXHIBIT NO. 9-A, with identification pasted on bottom "Railway Express Agency—Hokes, Pa. (Western Maryland Railway) A. K. Hohf—Storekeeper and Miller," received in evidence.)

A. Mr. Hohf handles the business himself and during this particular month you will note from the Exhibit that there was no business handled, but he does have some shipments of poultry and eggs and he looks after those himself.

Examiner Schoene: Is he the shipper of any of that business?

A. No, not to my knowledge. In fact, I am pretty positive that he is not. When I was there the other day, he spoke about some of his friends in the neighborhood being engaged in the egg business and he was trying to solicit their business. We can drop down to Linthicum, Maryland, which is also on the Annapolis Truck Route, formerly served by the Washington, Baltimore and Annapolis Railroad. At that place, the Washington, Baltimore and
681 Annapolis Railroad withdrew its agent and rented the
station to Mr. A. W. Fletcher, merchant, so the office is in the station, but he used it as a store and does not represent the railroad company. He and his wife handle the business which is brought to them by our truck from Baltimore. We can go to Millers, Maryland, a small point on the Western Maryland Railway, where we are represented by a store-keeper, general store-keeper and post-

master, and have been since 1912. The Western Maryland does not maintain any representation at that point to my knowledge. Mr. Zepp, the agent, handles some of the business himself, but he has a clerk in the store who also assists.

Q. Did you take a photograph of that also, Mr. Huff?

A. I did.

Mr. Hartung: I offer in evidence as Exhibit No. 10-A.

Examiner Schoene: Received in evidence.

(Photograph, 2¾"x4½", EXHIBIT NO. 10-A, with identification pasted on bottom "Railway Express Agency—Millers, Md. (Western Maryland Railway) J. H. Zepp—Storekeeper and Postmaster", received in evidence.)

A. At Mt. Union, Pennsylvania, an office on the Pennsylvania Railroad Company, we were advised by the railroad company that it had changed its agent's plans and he could no longer look after the present business, so T. H. Whitsel, who was acting as drayman and delivering business in the town and transferring between the Pennsylvania Railroad and the East Broad Top Railroad and Coal Company, was employed as agent and has acted for a number of years. The railroad company gave him a portion of the former baggage room adjacent to their station in which he installed a desk and on the outside wall placed a sign. He also maintains an office in his home which is about six blocks from the railroad station. Now at Mt. Wilson, Maryland, on the Western Maryland Railway, we are represented by Dr. J. A. Smith, physician in charge of the Mt. Wilson Sanitorium. Dr. Smith does not do any of the express work himself, but has it done principally by patients in the sanitorium and the business consists mostly of packages for the patients. There is an office in the sanitorium within approximately a block of the railroad 682 station. Let us take a look at New Oxford, Pennsylvania. That is a point on the Western Maryland Railway where their agent claimed that he did not have time to handle express and we contracted with Mr. John C. Myers, who operates a general store, way back in December, 1912, and he has represented us ever since. Mr. Myers has a very fine store and four or five clerks who look after the business for him and the store is located about a block and a half from the Western Maryland Railway station.

Q. Mr. Huff, you say the clerks look after the business for him. What business do you refer to?

A. I mean the express business. Newville, Pennsylvania—in 1934, the Pennsylvania Railroad Company notified us that their agent could no longer look after the express because of other duties and we employed the agent, Mr. G. E. Burkholder, who is engaged in the drayage business and he has represented us ever since. He conducts a general drayage business and also delivers and picks up express matter.

Q. Where does he conduct that business?

A. In his office where he has his drayage business, which, I understand, is about two blocks from the station. At Okonoko, West Virginia, the Baltimore and Ohio Railroad Company closed its office in July, 1918, and we contracted with Mr. I. A. Kromer, a general merchant, whose place is right across the street and he has looked after the express business for us ever since.

Q. He maintains the place for the conduct of the express business in his place of business?

A. In his store. We have another unusual situation at Sanitorium, Maryland, on the Western Maryland Railway, where since April, 1912, Dr. V. F. Cullen, a physician in charge, has been our agent on a contract basis but there, too, the patients do the entire express work. Dr. Cullen is known as the agent and is so carried in the records.

Q. That is a service which is provided, I would take it from what you say, for the convenience of the public.

A. For the convenience of the public, and the sani-
683 torium office itself is some little distance from the sta-
tion and the trucks of the sanitorium haul the business
up to the office, which is on a mountain side, and these
patients take care of it. The last one on the list is Walkers-
ville, Maryland.

Q. You said the circumstances were unusual. You mean it is unusual in that the work is entirely performed by patients rather than by the agent?

A. That is what I mean. At most of these places, the work is done by relatives and employees. In these two cases it is done by patients of the institutions. That is what made it seem unusual to my mind. The last one on the list is Walkersville, Maryland, on the Pennsylvania Railroad, where the hours of the agent were fixed by the railroad company so that he could no meet the principal train and on the request of the shippers, we contracted with A. S. Butler, a merchant, to represent us and he and his clerk handle the business as an accommodation to his own customers and the towns-people generally.

Examiner Schoene: Mr. Huff, does that complete your testimony on this exhibit?

A. One moment. I believe there is one other Exhibit.

Examiner Schoene: I just wanted to ask a question about this Exhibit before we proceed. You have not indicated that any of the persons described in this Exhibit in any way serve any railroad company. Are you prepared to state whether or not they do?

A. They do not.

Examiner Schoene: They would be people included within the classification of Exhibit No. 4-A which Mr. Gross introduced, rather than 2-A?

A. That is right.

Q. Mr. Huff, you have before you another photograph. Will you describe that?

A. This is a photostatic copy of an old picture which appeared in many publications designated as "The Old Depot," showing the various activities of joint railroad express agents, and it is interesting to note the numer-
684 ous kinds of business in which he is engaged and particular attention is drawn to the signs on the wall and especially that one reading "Directory," which indicates the numerous activities of the agent.

Q. You might state those.

A. Station agent, justice of peace, mayor, bank director, telegraph operator, president of the school board, express agent, president of the creamery association, baggage master, real estate agent, leader of the brass band and United States mail carrier.

Mr. Hartung: I offer this in evidence as Exhibit No. 11-A.

Examiner Schoene: Received in evidence.

(Photostatic copy of picture "The Old Depot" received in evidence as EXHIBIT NO. 11-A.)

Examiner Schoene: One question I would like to ask, Mr. Huff. I take it this is a drawing rather than a photograph, a photostatic copy of a drawing?

A. Yes.

Examiner Schoene: Do you know, Mr. Huff, whether the drawing represents an actual situation or the expression of the artist's impression?

A. If you had been with me at Greenmount the other day, you would have thought that was a photograph of that station.

Q. I note the Exhibit shows an individual as an agent in every instance, but I gather from your testimony that such individual does not handle the business himself or at least all of the business. Will you please explain that a little more fully?

A. Yes. We make an arrangement with one person to look after the business, not necessarily to perform it all himself, but our contract is with him and we hold him responsible for the results. As a matter of fact, it is common for the agent to be assisted by people in his service or by members of his family, though whether the agent is a so-called merchant agent or joint railroad express agent, these agents are not employees of the express company but have contracted to do the work and are free to do it in such manner as they choose, whether by performing the work themselves or by delegating others to do it.

The express company does not exercise any supervision over choice of who performs the work. It does not concern the Railway Express Agency. The Railway Express Agency chooses to have the work handled by contract rather than by employees. Our business moves at all hours of the day and night. The arrival and departure of the trains may not be during the business hours of the merchant or regular working hours of the railroad agent, but the agent must see that shipments are handled promptly. The Railway Express Agency does not require him and it has never been the practice of the Express Agency to require that the agent handle the business himself. He is free to enlist such assistance as he may need, to substitute—

Q. Is it true, Mr. Huff, that the joint railroad express agents are engaged and always have been engaged in many activities other than the railroad and express service? Answer what you know.

* * * * *

A. As far as my experience goes, that is true of a great many small joint railroad and express agents. They are grain buyers, dealers in various other commodities raised in the particular regions in which they reside, or are interested in contracting business, or are directors of banks, and take part in local political situations, etc. In talking with joint railroad and express agents—

Examiner Schoene: What geographical area does that cover?

A. I should say practically the states of New Jersey, Delaware, Maryland, the eastern shore of Virginia and the northeastern Shenandoah Valley section of Virginia, portions of West Virginia, and all of Pennsylvania east of Altoona.

Q. That is your present territory?

A. I don't have New Jersey at the present time. 686 That is what I have served as route agent or superintendent.

Examiner Schoene: The answer to your question applies to your experience in that locality?

A. That is right.

Q. Mr. Huff, you stated that the merchant agents and joint railroad express agents work at hours other than the regular business hours or the regular hours of employment in railroad service. Will you please explain that in a little more detail?

A. In several sections over which I have had jurisdiction, we have handled a great volume of perishable traffic, carloads of strawberries, fish, oysters, and similar commodities moving in L. C. L. quantities, received in the express business late in the day after the regular business hours of mercantile establishments and some time after regular hours of the railroad agent ended. In such cases, that business always has been handled by merchant agents or joint railroad express agents in the same manner as though the business had been offered during the regular business hours. This is entirely proper, for the agent receives a commission for doing the work at whatever hour the business is offered and very often that commission is very substantial. Of course, this is not true every day in the week, every month in the year. Perishable traffic moves in large quantities in short seasons. Of course, there are occasions of emergency shipments that move in other than regular business, which are handled by joint railroad express agents and merchant agents, if and when they are received. At certain places we have carload shipments of race horses which usually are received in the very early morning hours before the regular business day, and are often forwarded late at night, and are also received and forwarded on Sundays and holidays, when a merchant agent's store, as an example, would not be open, and in many instances, the railroad station would be closed. These joint railroad and express agents and merchant agents receipt for waybills, or deliver and arrange for collection of charges, and such other work as may be necessary properly to handle the traffic, and of course, receive the usual commission for that business.

687 Q. Mr. Huff, will you name some of the principal differences in the relation of the express companies with its employees, and the relation of the express company with these joint railroad and express agents?

A. In the first place, we have never regarded these joint railroad commission agents or merchant agents as employees in express companies.

* * * * *

A. (Continued.) They are persons with whom we enter into contracts to handle our business. While it is true that we take a form of application from them for the purpose of satisfying ourselves as to their character and responsibility, we do not secure their photographs or require them to take physical examinations which is required from our employees. They are not employees and we cannot promote them or demote them. We have never given them vacations; they have never been subject to our pension plan. They have never been provided with free transportation; they may not obtain group insurance, which is available to all our employees. These joint railroad and

express agents and merchant agents acquire no seniority
in the express service, and if a joint railroad and express
agent desires to hold some position in the express service,
he would have to enter the service as a new employee. We
have no right to apply any discipline to the joint rail-
688 road and express agents. For instance, it would not
be possible for the express company to suspend a joint
railroad and express agent, or to fire him, or otherwise to
punish him for any failure to carry on the business prop-
erly. The only recourse the agency has is to discontinue
the arrangement, in which event it must locate its agency
at some point other than on the railroad premises and
engage the services of an employee or enter into a contract
with a merchant agent.

Mr. Schreiber: Can you be a little more detailed with respect to the reasons why you cannot suspend a joint agent?

A. As previously stated, we have never felt that these people were employees, and we have no control over them.

Mr. Schreiber: You do have the power to discontinue the arrangement with them?

A. That is so.

Mr. Schreiber: If you were to say to them, in lieu of the complete exercise of that power, "We will not permit you to handle express business for the next thirty days," and at the end of that time, it is agreeable to you to continue him, what is to prevent you from taking that action?

A. Following your line of thought as to discontinuance of the man, we would have to discontinue the man, appoint a new agent for thirty days off the railroad premises, and then go back and reappoint this man, and we do not feel that we have the right to do that, because the man is under the control of the railroad company. He is their employee, not ours.

Mr. Schreiber: You feel the railroad company would raise objections to such action on your part?

A. I could not answer as to that. That situation has never arisen, but I presume they would feel that it was a rather peculiar situation and object to it.

Mr. Schreiber: Doesn't it really come down pretty much to the practical situation that to try to take care of the business outside the railroad premises, it would not pay to make the arrangement for the month?

689 A. Maybe it would not be under certain conditions. I do not say it would not. Certainly in other cases it might. But I cannot visualize a situation such as you portray it. There is nothing of that kind that has ever come up in my experience.

Examiner Schoene: You may cross-examine the witness, Mr. Hassenauer.

Cross-Examination by Mr. Hassenauer.

Q. You stated that it was the practice of the express company to require photographs from prospective employees, but not from railroad agents.

A. The express company uses only one form of application for employment. The photograph of the individual forms a part of the application in the case of employees. In the case of joint railroad and express agents and merchant agents, we have not considered them as our employees and have not required their photographs. In the case of joint agents, photographs would be furnished to the railroad companies if the railroad company's rules requested photographs to be taken. It would not be required of merchant agents, as they are representative business people. The photographic record of employees is desirable, because of our more intimate relations with them and to supplement other records, all of which information is useful in making promotions, transfers, and so forth. As I have already testified, applications from employees are taken for future reference for employee service files, while for joint and merchant agents, they are taken to determine their character and responsibility to serve as a performance bond.

Q. You are familiar with the General Rules and Instructions issued by the present express companies and its predecessors?

A. Yes.

Q. What have you to say as to the application of those rules and instructions to joint agents and merchant agents?

A. The general rules and instructions are issued
690 by the Railway Express Agency, and the same thing was true with respect to general rules and instructions issued by predecessor companies, and I believe a copy has been introduced in this case. They are very general and comprehensive in their scope. They are issued for guidance for all individuals who conduct or handle express business, whether as salaried employees, commission employees, joint employees, or employees of persons handling the business under contractual arrangement. It has never been the practice of any express company to issue separate sets of general rules and instructions to these different classes of persons. For this reason, there are many rules contained in the general rules and instructions which have no applications whatever to joint railroad and express agents or merchant agents. The principal application of the general rules and instructions to joint and merchant agents is to meet requirements of the law and to permit safe transportation of express matter.

Q. Now take up this item at Walkersville, Maryland, the last item on your Exhibit. I believe you stated that the hours of the railroad agent were such that the agent did not handle the express business. Is that correct?

A. Yes.

Q. Will you be a little more specific in that and explain just what you mean by that?

A. My understanding is that he was made agent at several near-by points, and he was required to be away from Walkersville, Maryland, during the time when the only two trains a day that served that office were there. He had to be relieved at the agency, and we closed it and reopened it on a contract with a storekeeper.

Q. What are the requirements of the Railway Express Agency with respect to the handling of the funds by merchant agents, more particularly with respect to the safety of those funds while in their possession?

A. The General Rules and Instructions were universally applied to all points, and reasonable care is to be exercised with all funds and remittances that are made to the Assistant Treasurer at specified intervals.

691 Q. Is there any particular limit put upon the amount of funds which the merchant agent is allowed to have in his possession overnight belonging to the Railway Express Agency in the offices listed in Exhibit 6-A?

A. I should say that nearly all of these were on a five dollar limit, and that applies to all offices. All offices have a limit of cash to be kept on hand.

Q. In the event there was no banking institution in any of these towns, what would he be required to do with any funds in excess of five dollars?

A. In some cases they take it home with them; in other cases they no doubt conceal it in their stores somewhere, as they do their own funds, protecting them in a similar manner, or lock them in their own safe.

Q. That is all, Mr. Examiner.

By Mr. Schreiber:

Q. Mr. Huff, in those cases where the express company furnishes scales and trucks, who maintains these scales and trucks in case they are out of order?

A. The express agency.

Q. At its own expense?

A. Yes sir.

Q. And if it becomes entirely out of order and needs to be replaced?

A. The express agency.

Q. At its own expense?

A. Yes sir.

Q. Where are shipments kept by the merchant agent or joint agent prior to delivery or prior to shipment? Are they kept on the premises of the merchant agent or on some premises of the express agency?

A. They are all kept on the premises of the merchant agent, generally in his store, or if he is engaged in drayage business, in the office where he conducts his drayage business.

* * * * *

692 Q. In the case of a merchant agent, since I understood the witness to say that they are all employed on the same basis, so that one proposition or one understanding or one agreement is applicable to all, what is the agreement which is one and the same for all with respect to payment for damages or loss to a shipment during the time that it is in the possession of the merchant agent?

* * * * *

A. Those instances are somewhat rare. I cannot recall any specific one of that kind involving a merchant agent.

Q. Is there any general contractual provision with respect to it?

A. The agent in accepting the agency agrees to exercise due care in the handling of the express business and protect the traffic which he handles. In case of a loss and damage claim, there is a form issued by the claim agent known as the claim sale order where the loss has definitely been placed and those come to the operating superintendent to endeavor to collect the loss from the persons responsible for it, or from the patrons who have perhaps failed to pay a C.O.D. through an error on the part of one of our employees, but I do not recall ever having seen one issued on one of these merchant agent offices, and the fact that they handle so little business as a rule would seem to indicate that they handle it carefully, and there are no such cases.

Q. You do not know of any such cases at all?

A. No sir.

Q. I think you testified that many of the joint railroad and express agents are also engaged in some business other than that for the railroad and express agency. Is this 693 applicable to those joint railroad and express agents who devote full time to the railroad and express agency? Do they conduct their special business outside the railroad working hours?

A. I would presume that they do.

Q. You mean that they put in an eight hour day on railroad and express work and at night they have some other work?

Mr. Hartung: I do not think Mr. Schreiber has a correct understanding of the situation. The railroad agent has not enough work to consume all of his time, and he acts as a joint agent for the Railway Express Agency. It has been a recognized practice for railroad agents to be engaged in other business. They may be handling that same business during the same hours that they are conducting their railroad work. Their railroad work may take only a few hours a day of their time. Maybe they have clerks that are doing that work. Many have been engaged in other business although during the same hours when they were performing their railroad duties.

Q. I want to know whether in the answer to the question presented the witness intended to convey that in most cases, the railroad and express agents are also in some business other than that for the railroad and express agency, and in the cases where it is true, do they conduct business at the same time that they conduct the railroad and express business, or is it a business conducted during irregular hours?

A. I would say that it is done during the same hours that they perform the railroad service.

Q. Would you say that this applies to the majority of the railroad agents or to a small number?

A. I don't believe I could confine that entirely to the working hours of the agent because I do know that he does some of his business after hours or before he comes to work in the morning, but I should say that the large part of it is done at the time he is at the railroad station, because everybody knows where he is.

Q. With respect to these joint railroad and express agents, who are engaged in other business, does this 694 other business interfere with respect to the duties to the express agency or the railroad?

A. I cannot answer for the railroad but it has never interfered with the service where the express agency is concerned.

Q. Are merchant agents required to meet trains at certain specified times so that sometimes they are required to handle business beyond the usual or normal working hours of the day?

A. They are, or those employees who assist them.

Q. But as a matter of fact, the contract requires them to meet trains at specified times?

A. They have no option in the matter. They must watch the train schedules. They are interested in their commission, and would not get any business if they did not.

Q. If they did not watch the train schedules, you would discontinue the relationship and get someone else who would?

A. That is right.

Q. When you hand to a merchant agent or a joint railroad and express agent a list of the rules and regulations which are generally and uniformly applicable, do you tell the joint railroad and express agent or the merchant agent which of these rules apply to them and which do not?

A. You mean at the time of his appointment?

Q. Yes.

A. I should say that the route agent goes over the principal rules that apply to the general conduct of the express business so that he would know how to conduct the business.

Q. But they do not point out each rule or make a list for him to look at, so that a railroad and express agent or a merchant agent does not know which of the rules apply to them?

A. They point out some of those which have a very specific application to the particular situation in which he finds himself; for instance, the care of money and valuation, etc.

Q. After the route agent and the joint railroad and express agent are finished with the task of going over the rules and regulations, is there a definite understanding between them as to which rules apply to him and which do not?

695 A. If you mean a written memorandum, I should say no.

Q. Just what other means is there for the agent to know which apply to him?

A. As the route agent instructs any new agent, he calls attention to certain rules which he feels he will have to refer to continually.

Q. How long have you been a route agent in the past?

A. One year.

Q. And you in your capacity as route agent instructed specifically certain individuals, merchant agents or joint agents in that respect?

A. I did.

Q. When were you a route agent?

A. 1912.

Q. Will you please turn to Exhibit 8 and tell us now which of these you advised those railroad agents to consider?

A. It was the Adams Express Company rules that I used at that time. These rules are vastly different from those prevailing at that time.

Q. That is all.

By Examiner Schoene:

Q. I think in response to a question Mr. Schreiber asked you stated that, for instance, at Bedington, West Virginia, you furnish certain trucks. I think you also testified in your direct testimony that a verbal contract was entered into between the express agency and Mrs. Butts, who is the merchant agent at that point. Did that verbal contract specify the number of trucks that would be furnished?

A. No.

Q. Did it specify that any trucks would be furnished?

A. No.

Q. I take it that it follows that it had no provisions with respect to the maintenance and repair of trucks either.

A. That is correct.

By Mr. Hassenauer:

Q. Going back to the testimony listed by Mr.
696 Schreiber, I want to get one thing clear. As I understand it, you made the statement that the joint railroad and express agents have other occupations which they perform concurrently with their railroad and express service. Is that correct?

A. That is correct.

Q. You don't mean that all joint railroad and express agents have outside occupations, do you?

A. By no means.

Q. Have you any idea as to what per cent of the joint railroad and express agents have outside occupations?

A. That would only be a guess, but the percentage would not be great. Probably fifteen or twenty per cent.

Q. You testified that you were a route agent for a period of one year. Are you acquainted with the circulars and instructions which are sent out by the Railway Express Agency to their agents and commission agents from time to time?

A. There are circular letters sent from different departments. I get copies of them now.

Q. Do they distinguish between the merchant agents and the joint railroad and express agents in sending out the circular letters and instructions?

A. No.

* * * * *

Q. You are familiar with the circulars and instructions which are received by these joint agents and merchant agents, are you not, from your experience as route agent?

697 A. Yes, back in 1912, and I have copies of them now.

Q. As a matter of fact, some of these instructions and circular letters addressed to agents, to commission agents, and also received by the merchant agents, refer to specific changes in the rules and regulations, do they not?

A. Yes.

Q. And as far as those changes are concerned, you do not distinguish between joint roalroad and express agents and merchant agents with regard to sending out these circulars?

A. Under certain circumstances, yes. The accounting instructions, as an example, might apply to joint railroad and express agents which might not apply to some of these smaller merchant agents.

Q. Do you know of any other instances where there would be an exception?

A. All of the circular letters or circulars that go to agents do not always go to all of the agents. Our salaried agents get very many more circular letters than our joint railroad agents or our merchant agents, because they have a great many more problems to face and different rules sometimes to apply in accounting and remitting and things of that sort.

Q. In your interview with these agents, as in Exhibit 6-A, do you know whether or not they had received any circulars or instructions from the Express Agency?

A. I do not.

Q. You said in answer to question by Mr. Schoene that Mrs. Butts, the agent located at Bedington, West Virginia, signed the application for employment and application for fidelity bond. Do you know whether or not that same practice is indulged in all of these cases of the stations or offices listed in Exhibit 6-A

A. That is the general practice. I presume it is done in all cases.

Q. Are there any joint railway express agents listed in Exhibit 6-A?

A. Not to my knowledge.

Q. Will you say that you can state specifically how many instances are listed in these offices in Exhibit 6-A where the railroad station has been closed?

698 A. I cannot tell you exactly, but I would guess that probably all but two or three.

Q. And in those two or three cases is there a railroad ticket agent operating in the station?

A. I think there is in one instance.

Q. Can you state that instance?

A. I believe at Mt. Union, Pennsylvania, for a short period of time each day—how long, I cannot say.

Q. You stated in this instance the Express Agency was advised by the railroad company that it had changed its agent's plans and he could not take care of the express business. What change put that into effect?

A. I understand he was put in charge of the freight business at another location and could not spend any time at the passenger station except for meeting certain trains for selling tickets.

Q. And that was the only reason he would occupy the station at Mt. Union?

A. Yes.

Q. Do you know of any instance in your experience with the Railway Express Agency where any of these agents, joint railroad express agents, have given cause for a suspension or demotion by the Railway Express Agency?

A. I do not know of any suspension or demotion because we have no right to do that. They are not considered our employees.

* * * * *

699 A. May I ask when you say all agents if you mean all joint railroad express agents and these on this list, or only those on the list?

Q. Yes.

A. We have had occasions of embezzlement, of course, on the part of joint railroad express agents, and that embezzlement has generally extended to the funds of the railroad company as well as our own and the railroad company has taken action to remove that agent from his position and appoint another one, whom we have used as our agent.

Q. Has the Railway Express Agency taken any action in any instance similar to that which you state the railroad company took in this instance?

A. We would have no right to discharge the railroad agent.

Q. As a matter of fact, you have never attempted it, isn't that true, because the facts have never arisen?

A. Do you mean the question of fact of embezzlement? The facts have arisen, of course.

Q. What action was taken by the Railway Express Agency?

A. The matter was reported to the Railroad superintendent of that division and he handled it with the accounting and treasury departments of his railroad.

Q. Are you speaking now of the case of joint funds of the railroad company and Express Agency? I am talking of embezzlement of Railway Express Agency funds alone.

A. Similar action would be taken.

Q. Do you know of any instance where that was done?

A. I cannot recall to mind any specific instance, but I feel confident that some have occurred.

Q. But you don't recall any instance?

A. Where only the Railway Express funds were embezzled? No, I do not.

Q. Then you have had no experience to suspend
700 or demote joint railroad express agents for embezzlement of Railway Express funds?

A. They have embezzled the Railway Express funds, but also the railroad funds.

Q. I am referring to the funds of the Railway Express Agency. You have never taken any action against an agent?

A. No.

Q. Do you know of any instance where this was done?

A. I am confident that plenty of cases of that kind are being reported to the railroad superintendent.

Q. But you do not know of specific cases?

A. No, not where only the Railway Express Agency funds were involved.

Q. State whether in all of your experience in connection with the American Railway Express or the Railway Express Agency any of the joint railroad express agents or any of the merchant agents in the territory served by them, ever sustained an accident while in the course of performing service for the Railway Express Agency?

A. Yes.

Q. Will you give us some specific instance, Mr. Huff?

*   *   *   *   *

A. I think I answered too hurriedly. You wanted to know of an instance of a joint railroad express agent. I was thinking of a joint baggage master. I would like to revise my answer and say I do not know of any joint railroad express agent having been.

701 Q. Mr. Huff, do you recall, in this office at Newville, Pennsylvania, of your having testified that, in 1904 the railroad company advised that the agent could no longer handle the express business?

A. That was in 1934.

Q. What was the nature of that advice?

A. It was a letter, as I recall it, from a supervising agent of the Pennsylvania Railroad to the effect that their agent had been assigned to some additional duties and could not longer look after the express business.

Q. Had you taken the matter up with the railroad company prior to that to endeavor to engage the railroad agent to act as agent for the express company?

A. Yes.

Q. That letter which you speak of was in response to inquiry for permission from the railroad company to have the agent act as Railway Express agent?

A. He had acted as Railway Express agent many years when they notified us he could no longer do so.

Q. In the event you desired to have him represent you further, would you have to have the approval of the railroad company to have him engaged as your agent at that particular station?

A. If you mean now, yes.

Q. Is that because of some agreement the Railway Express Agency has with the railroad company that you would ask that permission?

A. It is only a long standing practice.

Q. Are you familiar with the provisions of the agreement between the railroad and the Railway Express Agency? Will you outline it to us?

* * * * *

702 A. I have read them, yes.

Q. In these instances enumerated on Exhibit 6-A, what articles and equipment, if any, are furnished to these merchant agents by the Railway Express Agency for the conduct of the express business?

A. In nearly all instances, they are provided with a set of tariffs, with the necessary receipts on which to receipt for business, delivery sheets on which to secure signature for delivery of business, the necessary waybill forms, abstracts of their prepaid shipments, and statements of their receipted collect business.

Q. Do you furnish them with trucks and related equipment?

A. In one or two of those cases; we did at Bedington, West Virginia, provide 4-wheel trucks on account of the water cress business which moved in large volume, but at most of these places, no 4-wheel trucks are necessary. Also counter scales.

Q. In other words, you provide the tools necessary to carry on the agency?

A. No.

Q. You provide them with the forms necessary to complete the shipments?

A. Yes.

Q. And where the business required the furnishing of trucks for the express agency, you furnish them with trucks?

* * * * *

Q. You furnished Mrs. Butts with four trucks?

A. No, it was 4-Wheel trucks.

Q. You furnished those merchant agents with scales?

A. Yes.

Q. You only furnished trucks where the water cress business is heavy, as in the case of Bedington, West Virginia?

A. That is right. We did not supply any other equipment, desk or anything else.

Q. In other words, you don't furnish trucks where the business doesn't require it?

A. That is right. The railroad company generally
703 has a truck at those small places and it is jointly used.

Then after the water cress is loaded on the trucks, it is pulled in the shade of the waiting room until the train arrives, and is loaded on the train under Mrs. Butts' supervision by her children and sometimes her neighbors.

By Mr. Hartung:

Q. There were some questions asked you about the hours and what arrangements are made in the engagement of merchant agents and joint agents. Are there some places where an agent meets only one train a day?

A. Yes sir.

Q. And where his express business consists almost entirely of receiving shipments prior to the arrival of that train or receiving them from the train?

A. Yes sir.

Q. That particular train may arrive in the morning, in the afternoon or in the evening?

A. Generally in the evening, and departs in the evening. The agent in taking over this service agrees to do whatever is necessary to handle the express business.

Q. There is no agreement or arrangement with respect to the specific hours he should be engaged in that service?

A. No sir.

Q. It may be a few minutes a day, a few or several hours a day?

A. Depending on whether the train is on time and the volume of business.

Q. And his compensation is regulated by the amount of that business?

A. That is right.

Q. By the charges on that business?

A. That is correct.

Q. That is all.

By Mr. Hassenauer:

Q. Does Mrs. Butts direct Mr. Dennis to load the watercress?

A. Mr. Dennis is not there since it is his trucker that brings the shipments in, and I understand that Mrs. Butts is generally at the station when the trucks arrive and the drayman in charge of Mr. Dennis' shipments backs
704 up to the four-wheel trucks and transfers the merchandise to the truck with Mrs. Butts' children's assistance, or others she may engage.

Q. That is all.

* * * * *

MR. BARNEY B. ROBERTS, a witness introduced by Mr. Hartung, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hartung.

Q. Mr. Roberts, where do you reside?

A. Unadilla, Georgia.

Q. I understand you are one of those lucky individuals who are retired from all business.

A. That is correct. I personally don't conduct any business. I have a hardware store, but my son is in the hardware store.

Q. Where is this hardware store?

A. Vienna, Georgia.

Q. Did you formerly conduct that business yourself?

A. I bought that out just two months ago.

Q. Where were you formerly in business?

A. Coral Gables, Florida.

Q. Perhaps, if you will permit me, I will go back some years. Did you at one time work for the express company?

A. I worked for the Southern Express Company and American Railway Express Company and Railway Express Agency.

Q. When did you start working for the Southern Express Company and where?

A. Columbus, Georgia.

Q. In what capacity?

A. Wagon driver.

705 Q. Did you hold other positions with the Southern?

A. At the same place, Columbus, Georgia, I was clerk and later was depot agent, later cashier at Columbus, Georgia.

Q. Did you hold other positions with the express company?

A. With the Southern?

Q. With the Southern and others?

A. I was commission agent for the Southern Express Company at Andalusia, Alabama, three years. I was employed at Atlanta.

Q. What express company?

A. American.

Q. What period?

A. 1920 to 1925.

Q. Then what did you do?

A. I resigned and went to Miami, Florida, in the transfer business.

Q. When did you undertake that business?

A. September 1, 1925.

Q. Where was your place of business?

A. 69 Northwest Third Street in Miami.

Q. Did you continue in business there to move to some other place later?

A. In 1928, March 20, I moved to Coral Gables from Miami. That is 70 miles distance.

Q. What business were you in?

A. I was still in the transfer business and I also went into the express business.

Q. We will get to that in a moment. Where did you begin that business, the transfer business, at what place?

A. 216 Nonoka Avenue, Coral Gables.

Q. When did you move there?

A. March 20, 1928.

Q. Did you thereafter enter into an arrangement with the express company for handling of express business?

A. Yes.

Q. Did you engage in any other business besides?

A. Hardware store.

706 Q. At the same address?

A. 2346 Barguard.

Q. When did you start that business?

A. 1929.

Q. Since 1929, you have had two kinds of business, transfer and hardware. When did you start the express business?

A. Coral Gables, March 20, 1928.

Q. Will you tell us the circumstances leading up to your taking over the handling of the express business?

A. I heard that they were going to establish an express office at Coral Gables.

Q. There is no railroad station in Coral Gables?

A. No.

Q. How far from a railroad station? Is it at Miami?

A. Yes.

Q. You had heard the express company was going to open an office in Coral Gables?

A. I wrote the superintendent in Jacksonville and asked him if I would be considered in the job when it was available.

Q. Did you have some response?

A. He came to Miami and agreed to let me have the agency.

Q. Who was that?

A. B. W. Hendricks. He was superintendent of the Railway Express Agency at Jacksonville.

Q. What arrangements did you make with him for handling the express business? What did you take over?

A. You mean what equipment?

Q. What were you going to do for the Railway Express Agency?

A. I was going to go to the express house in Miami and deliver and pick up their shipments for customers on the contract basis in Coral Gables.

Q. You were to be paid certain compensation for performing pick up and delivery service and for draying to business houses between Coral Gables and Miami and doing all the work in connection with the handling of the business?

707 A. Yes.

Q. You began that business when?

A. March 20, 1928.

Q. And continued how long?

A. March 30, 1938.

Q. From what point did you conduct that business, from the hardware store?

A. From the drayage place, transfer office, I called it. I had a sign "Railway Express Agency and Transportation."

Q. And you engaged in business at that place?

A. Yes.

Q. What was your purpose in engaging in that business?

A. Make more money.

Q. Did you have any employees working for you there?

A. Yes.

Q. How many?

A. During certain seasons of the year, I had two, and in the height of the tourist season, five.

Q. How many men in the hardware place?

A. I had one laborer and woman.

Q. Who handled the express business at Coral Gables? To what extent did you do it yourself and to what extent did others do it?

A. I was their agent. Then the men on the truck, they delivered and picked it up at Miami and I carried it to Miami and assisted in the delivery and in any other transactions which were to be made.

Q. You said that the men on the truck did some of the work?

A. Yes.

Q. Did they do express work exclusively or were they engaged in draying generally?

A. Both draying and express.

Q. Was the business intermingled?

A. Yes.

Q. You carried the express along with the other business on the truck and the same employees handled it?

A. Yes.

Q. Were there periods when you were absent from Coral Gables?

708 A. Yes.

Q. Was the business carried on in the same manner in your absence by the men who worked for you?

A. Yes.

Q. Was that a matter of frequent occurrence?

A. That was the condition under which I accepted the agency—it would not be necessary that I be at the office at all times.

Q. Or personally do the work?

A. Yes.

Q. Did you always have the office at one place?

A. No, I moved to three locations, namely, 216 Nonoka Avenue, 310 Gawalter, and 136 Gawalter.

Q. Three different loactions?

A. Yes.

Q. Did you move of your own volition, without consultation with the express company?

A. No, I didn't ask them.

Q. Were you during that period agent for other corporations or businesses?

A. At the same time, we handled Westinghouse electrical appliances and Ferry Seed, Detroit, on commission basis and at present, we are handling license for the State of Georgia, hunting and fishing license on commission basis in our store.

Q. You were the agent for the Westinghouse people in Coral Gables?

A. Yes.

Q. You were local agent for that company, also for Ferry Seed and agent for the Railway Express Agency?

A. Yes.

Q. Did you state whether or not, Mr. Roberts, the employees in the hardware store took part in handling the express business?

A. No, only the employees of the drayage and transfer business.

Q. Did you have any regular hours assigned for the performance of his work?

A. No.

Q. You did it if and when you thought it proper to do it?

A. I assigned my own hours.

709 Q. Did you sometimes go on fishing trips?

A. Yes.

Q. Did you consult anybody before you took those trips?

A. No.

Q. Did you have any occasion to go to Atlanta from time to time?

A. I made 17 round trips between Coral Gables and Miami.

Q. So you were absent from the agency frequently and indefinitely at intervals?

A. More than half of the time.

Q. You never made any request to the Railway Express Agency for authority to do that or permission?

A. No.

Q. You considered yourself as being the man who conducted that business at Coral Gables?

A. Yes.

Q. You had formerly been an employee of the express company, had you not?

A. Since 1905 to 1925.

Q. During that period you received free transportation from the express company at any time?

A. As an employee, yes.

Q. Did you ever receive free transportation during the period you were agent at Coral Gables?

A. No.

Q. Did you receive vacations?

A. No.

Q. Did you consider yourself an employee of the express company while you were agent at Coral Gables?

A. No.

Cross-Examination by Mr. Hassenauer.

Q. Mr. Roberts, you say you were the agent for Westinghouse, for Ferry Seed, and also sold fishing license for the State of Georgia?

A. Yes.

Q. Is that an unusual practice, for a hardware store to handle Westinghouse products and to carry Ferry Seed?

710 A. I could not tell you. In Georgia, I have only been in business two months.

Q. You were in business in Florida. Did you have occasion to patronize any hardware stores in Coral Gables?

A. I ran a hardware store myself. I didn't patronize hardware stores.

Q. Did you handle Westinghouse products there?

A. Yes.

Q. Did you engage in house to house canvass in the vicinity to get people to buy Westinghouse electrical appliances or peddle any seeds?

A. No.

Q. That was just service you gave to the people coming in the store?

A. Yes.

Q. I understood you testified that in your arrangement with the express company you did not have to be on duty at all times to take care of express shipments and that you were then allowed to have some one else perform the service in your absence, is that correct?

A. Yes.

Q. That was understood with the experss agency?

A. Yes.

Q. Did you execute an application for a fidelity bond when you undertook this express business?

A. My recollection is I did.

Q. Did that cover your own activities or did that also cover the activities of any of your employees who were handling this express service?

A. Me, exclusively.

Q. Were there any losses sustained by the Express Agency during the time you represented them in Coral Gables, Florida—any damages to shipments or loss due in part to the negligence of your employees or yourself?

A. No.

Q. You had no experience of that kind?

A. No.

Q. And it was a fact that you could have trans-
711 ferred the handling of your express business to any
location in Coral Gables without notifying the Express Agency?

A. I did.

Q. Then no particular site was selected for you by the express agency when you entered into the agreement with them?

A. I rented a building at the time.

Q. They did not appoint any site?

A. No.

Mr. Hassenauer: That is all, Mr. Examiner.

By Mr. Schreiber:

Q. Did you sign an application for employment when you were appointed?

A. I don't know as you would consider that I was appointed, that was just a verbal agreement between myself and the superintendent that I accept the agency.

Q. You mean the entire arrangement was based on verbal agreement?

A. At the time I accepted the agency.

Q. Did you sign an agreement later?

A. I signed a bond application after a few days.

Q. Your agreement was a written agreement, not a verbal one, and you signed a bond application, not an agreement?

A. I signed a bond application a few days later.

Q. Application for bond or application for appointment?

A. It is all the same.

Q. Did you sign one document or two?

A. Only one. On the bond application, there is only one document to sign. That is my recollection.

Q. It also included an agreement of employment in the agreement or application for bond?

Mr. Hartung: Objection. That was an application for employment I suppose. The form was an application for employment, which includes an application for a bond, not an agreement for a bond.

A. That was an old American Express Company form.

By Mr. Schreiber:

Q. What was the basis of compensation?

712 A. I was to be paid $90.00 a month to transfer the business between Miami and Coral Gables on my truck and $134.00 to transact the business at the office, and 15 per cent for delivery and pick up.

Q. That comprised the agreement?

A. Yes.

Examiner Schoene: Was that written in any place? The amount of compensation, that was verbal?

A. Yes. That is my understanding.

By Mr. Schreiber:

Q. Was that for the entire ten years' period or was it changed any time?

A. The amount of revenue was different each month, the commissions would not be the same.

Q. Your pay for the entire ten years' period was the same, $90.00?

A. No, when business was a little heavy, I remember one time I got a little bit more for that service.

Q. I believe you testified you were rendering the service as and when you saw fit. As a matter of fact, you did make it your business to see that the shipments reached Miami in time for the trains?

A. No. We didn't meet the trains. We called for the shipments in the morning and they were taken to the train in the afternoon.

Q. Where did you deliver in Miami?

A. Express warehouse.

Q. And you had no specific delivery time during the day?

A. I had no written instructions.

Q. What were your verbal instructions?

A. Between eight and nine, call for them, and deliver between five and six.

Q. That was the procedure all the time?

A. Yes. It was not necessary that we do that, the trains did not leave until later in the afternoon.

Q. As long as you delivered at the same time more or less every day, that was your understading with the superintendent?

A. Yes.

Q. You were to deliver every day between five and six?

713 A. Every day, sometime it varied. It might have been a little later or it might have been a little earlier. I suited my convenience.

Q. You say the train left in the afternoon?

A. Yes.

Q. Did you deliver in the evening before it left or in the morning?

A. Not in the morning. They closed up.

Q. What time in the afternoon did the train leave?

A. Ten o'clock at night.

Q. It was important that you have your shipments there before ten o'clock at night?

A. They usually closed before that time. I don't know about the importance. It was never brought to my attention, but I usually carried the shipments down the last thing in the afternoon.

By Examiner Schoene:

Q. Mr. Roberts, you mentioned at one time when the business was heavy you got more than $90.00. How was that effected?

A. Just like hauling a trunk. If it was one trunk, it was $1.00; if two, it would be $2.00; just like biscuits.

Q. I understand your agreement of $90.00 per month was paid you for transfer business, irrespective of whether you had one trunk, or two, or any more. How did you arrive at the point that business was so heavy you got more money?

A. Account of the revenue.

Q. Could you be more specific? When did it get so heavy that it produced more revenue?

A. Nineteen twenty-eight, about the time Wall Street crashed. Business was good and they gave me more for transfer.

Q. How was the increase in compensation initiated? Did you ask for more money?

A. Yes.

Q. Whom did you approach?

A. The same man.

Q. What did you tell him?

A. I just told him business had increased and I would appreciate his helping me out by raising the compensation and they did.

714 Q. He didn't say that you were bound by your contract to haul it for $90.00?

A. No.

Q. How long was it after that conversation before you got your increase? 7

A. It had to go through the regular channels with the officials, probably 60 days. I don't recall.

Q. You say through the regular channels? Were those channels different than through the initial arrangements you went through?

A. Through the superintendent.

Q. You are not acquainted with the other ways in which it is handled?

A. No.

Q. Later the compensation went back to $90.00 per month?

A. Yes.

Q. How was that initiated?

A. When business decreased, naturally they noticed it, just as I noticed when it increased, and they let me know about it.

Q. And the superintendent approached you on that occasion, is that correct?

A. Yes.

Q. What did you say to him?

A. OK.

Q. You didn't say to him—I have a contract to handle that for the additional amount?

A. No.

By Mr. Hassenauer:

Q. You spoke about receiving additional compensation in the amount of $125.00?

A. That was the raise, additional—from $90.00 to $125.00.

Q. Did you receive a commission in addition to that?

A. My commissions naturally grew if the volume grew.

Q. What was the amount of the commissions?

A. Fifteen per cent.

Q. Up to what amount?

A. No stipulated amount.

715 By Examiner Schoene:

Q. If I understand you correctly, the 15 per cent applied to the business which you picked up and delivered. It did not apply to business you did at the store, is that correct?

A. No, it did not apply to the business at the store, at the transfer store, nor the office.

By Mr. Hartung:

Q. Your arrangement of $90.00 per month, Mr. Roberts, was based on the amount of business which you knew would be carried between Coral Gables and Miami, is that right?

A. Yes.

Q. You have contracted, I suppose, to perform drayage for various people?

A. Yes.

Q. You fix the amount by the amount of business you handle?

A. That is correct.

Q. When you found that there was a substantial increase in the express business which you had to dray, you felt that the amount which you agreed upon was too small and you asked that the amount be increased?

A. Yes.

Q. When business decreased you accepted the reduction in your compensation? That was a matter of negotiation. You got the best price you could get and the company drove the best bargain they could?

A. Yes.

By Examiner Schoene:

Q. Was there any period of time fixed during which this contract was to be enforced?

A. No.

Q. You felt that at any time the arrangement could be discontinued by the company for any reason or no reason?

A. Yes.

Q. You felt similarly free to discontinue the arrangement at your own desire?

716 A. Yes.

By Mr. Hartung:

Q. You did discontinue it, didn't you? How did you do it?

A. Yes. I notified the company I was leaving Coral Gables. I gave sixty days' notice that I was leaving.

Q. How is the business handled now?

A. It is handled through the Miami office.

Q. Performed by the Express Agency itself from Miami?

A. That is correct.

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1203 RAILROAD RETIREMENT BOARD.

Washington, D. C.

EXAMINER'S REPORT WITH RESPECT TO THE ORDER OF THE RAILROAD RETIREMENT BOARD DATED MAY 31, 1938, DIRECTING THAT JURISDICTIONAL DOCKET NO. 2 BE REOPENED FOR FURTHER EVIDENCE AND ARGUMENT BEFORE THE EXAMINER.

1205

Part I.

Introductory.

By its order of October 28, 1937, the Railroad Retirement Board directed me, as General Counsel, to hold a hearing and to act as Examiner of the Board, to receive arguments and, thereafter, to formulate findings of fact and conclusions of law to enable the Board to make proper answer to the following questions:

> "Are persons performing duties for the Railway Express Agency in return for compensation on a commission basis, and who devote substantial portions of their time to other occupations, particularly railroad service, to be classified as employees under the Railroad Retirement Acts of 1935 and 1937?
>
> "Is the time devoted to the performance of such duties for the Railway Express Agency, or its predecessors, creditable as 'service' toward annuities under said Acts?"

In accordance with that order, a hearing was held on December 15, 1937, at the Board's offices in Washington, D. C., in which hearing the Railway Express Agency, Inc., The Order of Railroad Telegraphers, and The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, participated. Two representatives of the Bureau of Internal Revenue entered appearances at the hearing but did not otherwise participate in the proceedings. Subsequently, a brief was filed by the Railway Express Agency, Inc., and a joint brief was filed on behalf of the Order of Railroad Telegraphers and the Brotherhood of Railway and Steamship Clerk's Freight Handlers, Express and Station Employees. It was the desire of the parties to present oral argument in support of their respective positions, and such argument was heard on January 17, 1938, at the offices of the Board, in which argument the Railway Express Agency, Inc., and the Order of Railroad Telegraphers participated.

Transcripts of the proceedings at the hearing and the oral argument were submitted to the Board, as were the briefs filed by the respective parties, and, on March 19, 1938, the examiner submitted to the Board his report, 1206 including discussion of the evidence, findings of fact, conclusions of law, and recommendation for decision. The Board examined the above documents and considered the entire evidence, the arguments of the respective parties and the report of the examiner. Thereafter, on March 24, 1938, the Board made the following decision:

> "(1) The Board approves and adopts the findings of fact made by the examiner; (2) The Board approves and adopts the conclusions of law reached by the examiner; (3) The Board adopts the report of the examiner as its opinion in the disposition of the matter; and (4) The Board decides the questions stated in its order of October 28, 1937, as recommended by the examiner in his report of March 19, 1938, formulating the following rulings with respect thereto:
>
> > (a) The individuals described as 'joint agents' or as 'merchant agents,' while rendering service to the Railway Express Agency, Inc., are 'in the service of' the Railway Express Agency, Inc., within the meaning of Section 1 (c) of the Railroad Retirement Acts of 1935 and 1937; such in-

> dividuals are therefore employees under the Railroad Retirement Act of 1937; and they are also employees under the Railroad Retirement Act of 1935 if they were on or after August 29, 1935, in the service of or in an employment relation to the Railway Express Agency, Inc., or were otherwise employees as defined in that Act; and
>
> (b) The time devoted by such individuals to the performance of their duties for the Railway Express Agency, Inc., is creditable as service toward annuities under the Railroad Retirement Acts of 1935 and 1937, subject to provisions of said Acts pertaining to the creditability of service toward annuities."

By letter dated April 16, 1938, counsel for the Express Agency took exception to the examiner's report in certain respects and requested leave to present additional facts before the examiner and thereafter leave to argue the issues before the Board in banc. The Board gave full consideration to this request and, on May 31, 1938, entered the following order:

> "It is hereby ordered and directed (1) that Jurisdictional Docket No. 2 be reopened with leave to all parties who have entered appearances in the matter to present further evidence and arguments before the Examiner on June 20, 1938, or such other date as the Examiner may fix to meet the convenience of all parties, upon the questions constituting the subject matter of the inquiry;
>
> (2) That the evidence be directed so far as possible to the presentation of evidence not heretofore in the record, that repetition be avoided, and that argument be directed to new matters and toward such specific matters in the Examiner's report as are claimed to be in error;
>
> (3) That particular attention be directed to the presentation of more complete evidence regarding the status of merchant agents;

> (4) That decision be reserved upon the question whether argument before the Board in banc shall be permitted."

Pursuant to the above order, the examiner held a hearing on August 5, 1938, in the offices of the Board at Washington, D. C., in which hearing the Express Agency and the Order of Railroad Telegraphers participated. At the conclusion of the hearing, it was agreed that a proposed report be issued by the examiner, on the basis of which both parties to the hearing would be given an opportunity to file exceptions and to request oral argument on the exceptions before the Board. Subsequently, briefs were filed by the Express Agency and the Order of Railroad Telegraphers respectively.

1208

Part II.

Facts.

The statement of facts in this report will be largely confined to stating only such additional facts as were developed at the rehearing on August 5, 1938.

1. Joint Agents.

It was testified at the original hearing that there were about 16,000 joint agents. Not more than an estimated 15 to 20 per cent of this number (including 387 of the 1,469 agents listed by the Express Agency as merchant agents) engaged also in outside occupations. (R. 38.)*

When a vacancy occurs in the position of agent at a point where the railroad agent usually acts also as express agent, the railroad company fills the position of railroad agent in accordance with seniority rules. However, ap-

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* In this report the letter "R" refers to page or pages of the Record on rehearing. "O. Rep." refers to page or pages of the Examiner's original Report.

plicants for the position know that express business is usually handled by the agent in this position, and, in estimating the compensation of the position, take into consideration the expectable express commissions as well as the compensation to be received from the railroad. The fact that the position usually involves the handling of express is, in some instances, shown by the agreement between the railroad company and its agents, and in some instances, by the bulletin published by the railroad company advertising the position, which bulletin may or may not indicate the average express commissions at the point involved. The Express Agency does not negotiate directly with the individual applying for the position nor does it participate in determining to whom the position shall be assigned. When the newly appointed individual reports for service, the railroad company checks him in as railroad agent. At the same time, the Express Agency,
1209 through its route agent, checks him in as express agent, and, unless his last previous employment included service as express agent, has him sign the "Application for Employment," etc., as stated in the Original Report. (R. 76, 77, 85, 89, 97, 117, Ex. 14b.)

As a part of their duties to the Express Agency, joint agents are in some cases given jurisdiction over an employee of the Express Agency. Thus, some joint agents are required to transmit orders for pick up and delivery service to a truck driver employee of the Express Agency, keep a daily time record of that employee's time, make out and forward to the Express Agency a semi-monthly time roll with respect to that employee, transmit to that employee his pay check from the Express Agency, and exercise exclusive jurisdiction over him. Some joint agents also arrange for purchases of gas and oil for Express Agency trucks used in pick up and delivery service, and for their repair and maintenance, such purchases and repairs being paid for by the joint agent out of the station funds. (R. 61, 62, 78, 83.)

Joint agents are available for express service during all the hours assigned for railroad service. In cases in which joint agents could not meet trains as required by the Express Agency, or could not be present at the station except for a few minutes at train time, the Express Agency discontinued the relationship and engaged other persons as agents. (R. 25, 32, 40, 87.) Joint agents are at times also required to render express service outside the hours assigned for railroad service. In such cases, railroad companies have refused to compensate the agents for such overtime service and the Express Agency has compensated them at one and one-half times the railroad rate of pay in addition to the normal express commissions on shipments handled in the overtime period. (R. 121, 122, 123.)

When a joint agent wishes to be absent from his duties as joint agent, he secures permission from an appropriate official of the railroad company. The regular agent has no voice in selecting his substitute, such substitute
1210 being selected by the railroad company. As in the
case of filling non-temporary vacancies, this substitute becomes express agent as well as railroad agent without any direct negotiation with the Express Agency. The regular agent transfers his express accounts to the substitute and, when the regular agent returns from his absence, the substitute transfers the express accounts to him. (R. 79, 80, 83, 88, 90.)

In addition to furnishing each joint agent with a copy of the general Rules and Regulations (referred to in the Original Report), the Express Agency issues from time to time to such agents and to exclusive and merchant agents, the same circular letters and instructions, some of which refer to specific changes in the general rules and regulations. However, in some instances in which the instructions contained in a letter or circular bear no relationship to the duties of a particular agent or group of agents, such letter or circular may be sent only to those agents to whose duties the instructions relate. Any rules, regulations, instructions or circular letters, distributed to a particular agent or group of agents, apply to such agent or agents unless such agent or agents are expressly exempted therefrom, and only in so far as such rules, etc., are related to the duties of such agent or agents. (O. Rep. 14, R. 36, 39.) Like the general rules and regulations, these circular letters and instructions specify the manner and method of performing the joint agent's express service and they direct the work which the joint agent is to do with such completeness and detail that little room is left for the exercise of discretion on his part as to how the express business at his agency should be carried on. (R. 64-72, 93, Ex. 16, 2b.)

In determining rates of pay for railroad service rendered by joint agents, whether by agreement, by order of a federal agency, or otherwise, consideration is given to the average amount of express commissions which the joint agent is expected to receive. The rate of pay for such
railroad service is less than it would be if express
1211 commissions were not to be received, but the joint
agent's aggregate compensation from the Express Agency and the railroad company is usually more than his compensation from the railroad company alone would be if express commissions were not to be received. The extent of reduction in the railroad rate of pay in such cases is determined by considering the express and railroad services as the service of a single position, by considering the aggregate compensation for both services as the compensation for that position, and by considering what aggregate compensation for both services would be reasonable for the express and railroad duties combined. (R. 77, 97 et seq.)

In connection with the Railroad Retirement Act (of 1934), the Express Agency instructed both joint and exclusive commission agents to deduct two per cent from their express commissions as employee contribution. This instruction was stated not to be applicable to merchan agents who did not render service to railroads, nor to persons employed and paid by commission agents; and if a commission was paid to an agent who employed another person to do all his express work, no deduction whatever was to be made. (R. 118, Ex. 16b B.) Under date of April 10, 1936, the Express Agency issued a bulletin to all agents stating in part as follows (R. 119, Ex. 17b):

> "Railroad Retirement Act—Commission Agents.
>
> "In connection with the Railroad Retirement Act, effective March 1, 1936, please be advised that no 'Income Tax' deductions for Retirement Fund will be made from amounts due joint Railroad-Express Commission Agents or other joint employees, not exclusively under the control of the Railway Express agency."

The Bureau of Internal Revenue has ruled that joint agents were employees under the Carriers Taxing Act of 1935 and also under the Carriers Taxing Act of 1937. (R. 120, Ex. 19b, 20b.)

2. Merchant Agents.

In the month of March, 1937, in which month the Express
Agency's transportation charges were 9.24 per cent
1212 of the total for that entire year, 1,469 agents were
described by the Express Agency as merchant agents,
of which 387 also rendered service to railroads while 1,082
did not render service to railroads. In addition to Express
Agency service, almost all were engaged in outside non-railroad activities, some as employees and some in independent capacities. Thus, in that same month, of the 1,469

merchants, 734 were merchants or storekeepers, 56 were farmers, 53 were housewives, 92 were postmasters and postmistresses, 117 were in the trucking, drayage, bus or taxi business, 62 operated automobile agencies, service stations, garages and repair shops, and the remainder were engaged in occupations such as clerk, packing concern employee, coal company employee, store employee, hotel employee, teacher, priest, student, insurance salesman, mail carrier, undertaker, painter and blacksmith. All the merchant agents were individuals, with the possible exception of twelve, which were described as "companies" engaged in "Trucking, Drayage, Bus and Taxi" business (Ex. 2a, 4a; R. 13, 22, 23.)

The Express Agency's reasons for engaging merchant agents rather than exclusive agents is that the communities in which the merchant agents are engaged to render service are relatively small towns of low population in which there is not enough express business to justify the engaging of a full time agent. (R. 11, 12.) Other reasons of the Express Agency were stated by one of its witnesses (Gross, R. 8) as follows, " A review was made to develop the reason for engaging merchant agents to represent the express company. The reasons found were many. Of the 1,082 merchants referred to hereinbefore, 502 agencies of the express company were at some time represented by an individual also representing the railroad company. In the majority of those cases, merchant agents were engaged by the Railroad Express Agency after the railroad agencies were discontinued. In some cases, the railroad agents were unable to provide pick up and delivery service, or for some reason they could not handle express traffic. In some cases
railroad agents were not interested in handling ex-
1213 press traffic. In some cases the railroad offices were
so far removed from the business section of the locality. Many other reasons were the causes of the discontinu-

ance of the joint arrangements. Where at some time th arrangement had been joint, it was found there were n railroad agents and in some cases, no railroad service In some cases railroad agents have refused to handle express traffic. In many cases merchant agents were engage to provide satisfactory and convenient service to ou patrons."

The merchant agents, when engaged to render service sign the same "Application for Employment," includin the same "Application for Fidelity Bond, etc.," and th same Form 95 as are signed by the exclusive commissio agents and the joint agents; however, the merchant agent and joint agents are not required to furnish persona photographs as are the exclusive agents. (R. 18, 19, 29, 3 39; O. R. 9, 34.) The relevant portions of these forms ar quoted on pages 7 and 8 of the Original Report.

The duties of the merchant agents are to receive an deliver express shipments, handle such shipments to an from trains, collect transportation charges, and make nece sary remittances and reports to the Express Agency. I some instances, they also perform pick up and deliver service; this, however, is not the usual practice. (R. 1 18-31.)

For their services, the merchant agents are paid on commission basis, generally about 10%. (R. 2; Ex. 1a, 3 6a; O. Rec. 16.) The amounts of commissions earned du ing the month of March 1937 were as follows (Exs. 15, 1 3a):

	Amounts earned as commissions			
	$5.00 or less	$5.01 to $10.00	$10.01 to $50.00	$50.01 t $250.00 or over
Percentage of the 387 Merchant Agents who also render service to railroads....	80.36%	12.40%	4.39%	2.85%
Percentage of the 1082 Merchant Agents who do not render service to railroads	41.68%	14.41%	25.05%	18.86%
Percentage of the 15,559 Joint Agents	43.18%	21.01%	27.97%	7.84%

1214 Except with respect to the handling of express shipments to and from trains, the merchant agents usually perform their duties on their own premises. (R. 21, 33.) While the contract of employment does not specify what, if any, equipment or supplies are to be furnished, the Express Agency furnishes each merchant agent with a set of tariffs, forms for the receipt of express shipments, the receipt of transportation charges, the delivery of shipments, way-bill forms, abstract of prepaid shipments forms, forms for statement of receipted collect business, and any other necessary forms. The Express Agency also furnishes each merchant agent with counter scales, and whenever the express business is so heavy as to require the use of four-wheel trucks, such trucks are furnished by the Express Agency. (R. 19, 37, 44.) Scales and trucks furnished by the Express Agency are maintained by it at its own expense and, whenever necessary, are replaced by it. (R. 33.)

Usually, the merchant agents perform their express service during the regular or normal business hours of the day. However, when the nature of the express shipments makes it necessary (as in the case of perishable foodstuffs), the merchant agents are required by the Express Agency to meet trains at any time, even outside the regular business hours. Should any merchant agent fail to meet trains or handle express business as required, whether or not during the regular business hours, the Express Agency would discontinue the relationship and engage some other individual. (R. 28, 36, 45.)

Usually, the merchant agents perform the express service themselves. In unusual situations, relatives of the agent or o r persons assist in the performance of the express service. (R. 19, 20, 23, 24, 25, 26.) The record does not show whether these assistants are always compensated by the agents.

The merchant agents are not given vacations, pensions
free transportation, or the privilege of obtainin
1215 group insurance, nor do they acquire any seniorit
rights in the express service. (R. 29.) They are no
reported to the Interstate Commerce Commission on th
Interstate Commerce Commission Form entitled "State
ment of Employees' Service and Compensation for th
Calendar Year ...." There is no specific ruling by th
Interstate Commerce Commission as to whether merchan
agents should be reported on this form. This form re
quires the Express Agency to report, with respect to eac
class of its employees, the number of employees, the num
ber of straight time and overtime hours of service, and th
amount of compensation for such service. The Expres
Agency does not keep a record of the hours of service o
its commission agents. Because this form calls for a state
ment based on a record of hours of straight time and over
time, and because no such record is kept by the Expres
Agency with respect to merchant agents, it has conclude
that such agents are not within the scope of the ter
"employee," as used in the title of the form, and there
fore has not reported them to the Interstate Commerc
Commission on that form, but has reported their compen
sation under a separate operating expense account. (F
7, 8, 15, 16.)

Every merchant agent, when engaged, is given by th
Express Agency a set of the Rules and Regulations (E
8), discussed on pages 11-14 of the original Examiner'
Report (R. 19, 31, 32), and is also given from time to tim
instructions and circular letters relating to the perforn
ance of his duties, some of which instructions and circu
lar letters refer to specific changes in the Rules and Regu
lations. (R. 38, 39.) Many of these rules, regulation
instructions and circular letters specify the manner an
method of performing the express service. (O. Rep. 1

14; R. 32; Ex. 1b.) For example, nearly all merchant agents are not permitted to keep on hand overnight more than $5.00 of the Express Agency's funds. (R. 33.) It is essential for merchant agents to know the provisions of these rules and regulations in so far as they relate to their service for the Express Agency. (R. 19.) The same
rules, regulations, instructions, and circular letters
1216 are issued by the Express Agency to exclusive agents,
joint agents and merchant agents, alike (R. 32, 38); the applicability of such rules, regulations and instructions to the merchant agents is dependent upon the same considerations as those stated on page 8 hereof with respect to joint agents. (O. Rep. 14, R. 36, 39.)

The Express Agency presented as a witness Barney B. Roberts (R. 46-58), now retired. Mr. Roberts had been employed by the Southern Express Company from 1905 to 1920 as wagon driver, clerk, depot agent, cashier and commission agent, and had been employed by the American Railway Express Company from 1920 to 1925 in an unstated capacity. In 1925, he resigned from express service and engaged in the transfer business at Miami, Florida. On March 20, 1928, he moved to Coral Gables, at which point there was no railroad station, and which was 7* miles from Miami. On the same date, he began, under an arrangement terminable at will, to render for the Express Agency, three kinds of service (a) as agent at Coral Gables, for which he was paid $134.00 monthly, (b) pick up and delivery service at Coral Gables, for which he was paid 15% of the express transportation charges, and (c) transfer of express business between Coral Gables and Miami, for which he was paid $90.00 monthly. Except as stated in the next paragraph, this arrangement continued until March 30, 1938, when it was discontinued by Mr. Roberts on sixty days' notice. Mr. Roberts signed the same

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* Record states 70 miles, evidently in error.

"Application for Employment," including the same "Application for Fidelity Bond, Etc.," as is signed by the exclusive commission agents and joint agents. These applications covered only Mr. Roberts and not persons engaged to assist him.

In 1928 when business became heavier, Mr. Roberts requested an increase in his compensation for the transfer service, which increase was granted (from $90.00 to $125.00). Thereafter, when business became less heavy, the Express Agency initiated a decrease to $90.00,
1217 which Mr. Roberts accepted. In neither the case of the increase nor the decrease did either party make the claim that the other party was bound by a "contract" for a specified amount.

In 1929, Mr. Roberts opened a hardware store at Coral Gables, which he thereafter operated while continuing his service for the Express Agency. This store was not operated on the same premises as the drayage and express business and the few employees which Mr. Roberts had in the store rendered no service whatever in connection with the express service. Mr. Roberts also had the agency, on a commission basis, for the sale of Westinghouse electrical appliances and seeds of the Ferry Seed Company, but this was conducted entirely at the hardware store.

Mr. Roberts performed his duties as Express Agent at his drayage premises and performed his other express service out of the same premises. The pick up and delivery at Coral Gables and the transfer between Coral Gables and Miami were performed with Mr. Roberts' truck which was also used for his own drayage business, both express shipments and Mr. Roberts' own drayage packages being carried on the same truck at the same time. Mr. Roberts had two to five employees in his drayage business (the number depending on the season), who handled both express business and his drayage business.

No regular hours were assigned for the performance of the express service. However, in connection with the transfer business, Mr. Roberts was verbally instructed to call for the express at the Express Agency's warehouse in Miami between 8:00 and 9:00 A. M., and to deliver express to the same warehouse between 5:00 and 6:00 P. M. He occasionally deviated slightly from this schedule to suit his own convenience. The train carrying express out of Miami left at 10:00 P. M., but the express warehouse usually closed before that time.

Mr. Roberts accepted the agency on the condition that he would not have to be at the office at all times and 1218 would not personally have to do the work. In accordance with that condition, he was occasionally absent from the office without securing in each instance specific permission from the Express Agency. He changed the location of the drayage-express office three times without consulting the Express Agency.

During the period 1905 to 1925 Mr. Roberts was given free transportation by the Express Agency, but during the period 1928 to 1938 he did not receive such transportation from the Express Agency and did not receive any vacations. Mr. Roberts testified that he did not consider himself to have been an employee of the Express Agency during the period 1928 to 1938.

1219 Part III.

Discussion.

1. Joint Agents.

In the Examiner's Original Report, the conclusion was reached that joint agents are employees of the Express Agency rather than independent contractors. The principal reasons for this conclusion may be briefly summarized as follows: (1) The joint agents, when engaged, sign an

"Application for Employment," including an "Application for Fidelity Bond, etc.," whereby they agree to perform their duties "all as required by the rules and regulations of the Company." This language is broad enough to authorize the Express Agency to direct the means and method of rendering the joint agents' service, as well as the general results which those agents are to accomplish. (2) The same forms are used in engaging other individuals, including exclusive agents, who are admitted by the Express Agency to be employees rather than independent contractors. Since the language of these *forms* is descriptive of the obligations assumed by admitted employees who are subject to control as to the manner of performing their service, this language evidently imposes the same obligations upon joint agents. (3) The Exp ss Agency's business involves compliance with numerous regulations of the Interstate Commerce Commission, the meeting of certain obligations to its patrons, and the maintenance of close harmony and cooperation with the railroad companies. Therefore, from a practical point of view, it is unreasonable to believe that each one of the 16,000 or more joint agents (or merchant agents) is intended to devise his own methods for achieveing the desired results. (4) The Express Agency has issued rules and regulations which apply to joint agents and which specify in detail the means and methods to be followed by such agents in performing their express service. (5) The Express Agency also issues to joint agents verbal instructions with respect to the manner and method of performing their express service. (6) Other facts and circumstances, although not affirmatively indicative of employee status, are not inconsistent therewith.

1220 The evidence on rehearing confirms the conclusion referred to above.

In its letter to the Board of April 16, 1938, and in its brief of September 15, 1938 (filed after rehearing), the

Express Agency took exception in a number of respects to the Examiner's original report.

With respect to the Application for Employment, including the Application for Fidelity Bond, and the Form 95, the Express Agency contends on page 2 of its letter and on pages 13, 14, 15 and 16 of its last brief that (1) the provisions in those forms relate to the keeping of accurate accounts and to a performance bond and that such provisions are not inconsistent with a status of independent contractor, and (2) as a matter of practice, it does not and may not control the methods, means and details of the joint agents' express service "because frequently the work is done by others whom he employs solely upon his own initiative and at his expense not only to do express work but to do other work in which the agent may be engaged."

The language of the application clearly applies to all duties of the joint agent, and not merely to the keeping of accounts, nor is the agreement expressly limited to the accomplishment of general results. Unless there be facts and circumstances showing that the agreement was intended to be so limited, it must be construed as extending also to means and method. In this case, no such facts and circumstances are present; as a matter of fact, as shown in the Examiner's original report, the facts and circumstances here clearly require an interpretation that the language of the agreement was intended to apply to manner and means as well as result.

On pages 13 and 14 of its last brief the Express Agency cites two rulings of the Bureau of Internal Revenue, dated January 9, 1937, and December 6, 1937, respectively, both re General Agents of the Massachusetts Mutual Life Insurance Company. In the ruling of January 9, 1937, the
Bureau held the agents to be employees; the ruling
1221 of December 6, 1937, reversed that ruling and held
the agents to be independent contractors. The ruling

of December 6, 1937, was cited by the Express Agency in its opening brief in this proceeding, and, on pages 17-18 of the Examiner's original report, was fully discussed and was distinguished from the situation with which we are here concerned. The Bureau's ruling is based on special facts and circumstances, particularly a supplemental statement by the insurance company, in the light of which the contract provision with respect to rules and instructions was given a restricted interpretation. In the situation here involved, no such special facts and circumstances appear. As a matter of fact, the same Bureau has ruled that the joint agents here involved are employees, within the meaning of the Carriers Taxing Act of 1935 and 1937. (See page 9 above.)

The Express Agency's second contention with respect to the application is based entirely on its statement at bottom of page 15 of its last brief that "frequently the [joint agent's] work is done by others whom he employs solely upon his own initiative and at his own expense * * *" This contention is disposed of by the discussion on pages 24-28 below, which shows (1) that joint agents and merchant agents are not permitted to delegate to another person any portion of their duties, unless authorized by a superior officer of the Express Agency, and (2) that, in any event, the hiring of assistants by an individual upon his own initiative and at his own expense does not prevent such individual from being an employee.

The Express Agency contends that the Rules and Regulations, in so far as they are applicable to joint agents, are "in the nature of specifications to which the agent as a subcontractor of the Express Agency, the general contractor, shall conform," (page 17 of last brief), and further that they "are general rules, applicable to all such agents alike, and do not give the carrier the right to control such agents individually as to the manner in which they arrange

to have done the work they have contracted to have performed." (Last brief, bottom page 18.) These
1222 contentions cannot have any bearing on the question
whether joint agents are employees or independent contractors, unless the Express Agency intends them to mean that the Rules and Regulations (a) are not subject to change without the mutual consent of the Express Agency and the joint agents, or (b) are merely a detailed statement of results to be accomplished, not going to the manner of accomplishing those results. However, it was shown in the original report and confirmed by the evidence at the rehearing that the Rules and Regulations are subject to change from time to time by the Express Agency without the consent of the joint agents. This is not denied by the Express Agency. Also, there are quoted in the original report some typical rules and regulations which were shown to be applicable to joint agents and which clearly go to the manner of performing the joint agent's express service. The Express Agency has not shown that these rules and regulations are not applicable to joint agents and does not deny that they go to the manner of performing the joint agents' service. Furthermore, it was shown in the Examiner's original report (page 15) that the Express Agency has authority to supervise, and does supervise, individually the joint agents with respect to means, methods and details. Since the Express Agency does possess such authority, it is immaterial whether the authority is exercised frequently or infrequently. In the case of *Hartley* v. *Red Ball Transit Co.*, 344 Ill., 534, 176 N. E. 751, the Court's opinion stated:

> "The test of the relationship [employer-employee] is the right to control. It is not the fact of actual interference with the control but the right to interfere that makes the difference between an individual contractor and a servant or agent * * *"

The Express Agency states on page 18 of its last brief that, as a common carrier, it is responsible for any loss or damage to shipments, or for any injury to others resulting from negligent performance of its work, regardless whether such loss, damage, or injury is caused by an employee or an independent contractor. This statement by the Express
Agency is evidently intended to describe its reason
1223 for retaining authority to specify and direct the man-
ner of rendition of the joint agents' service. The Express Agency's statement of its reasons for retaining authority to control the manner of rendition of the joint agents' service shows that the Express Agency does in fact have authority to control the manner of performing joint agents' service, and that joint agents are employees rather than independent contractors. The compelling nature of the reasons demonstrates the impracticability of operating through independent contractors.

The Express Agency contends that it cannot enforce the Rules and Regulations because, it states, the only way in which it can punish infractions thereof is by terminating its relationship with the joint agent and "Such punishment differs in no respect from the punishment a principal might mete out to an independent contractor." (Page 3 of letter of April 16, 1938.) Implicit in this statement of the method of enforcement is a contradiction of the point sought to be proved. Necessarily, the description of the method of enforcement presupposes that enforcement is possible, and, irrespective of similarities between the method of enforcement applicable to these individuals and that applicable to the enforcement of the obligations of an independent contracter, the terms to be enforced are substantially different. As has been shown above, the authority of the Express Agency, and its exercise as well, extends to supervision and direction of the manner of rendition of the service and it is that fact, rather than the sanction for the authority, which is material in bringing these individuals within the master and servant relationship at common law and the statutory definition of service in the Railroad Retirement Acts. Even if the sanction be assumed to be the same as that by which the obligations of an independent contractor are enforced, nevertheless, the fact remains that the obligations of the independent contractor extend only to the results produced.

As a matter of fact, however, the evidence shows that the sanction employed for the enforcement of the obli-
1224 gations of a joint agent is more nearly analogous to
that employed for the enforcement of the obligations of any ordinary employee than it is to the sanction employed for the enforcement of an independent contractor's obligations. As shown on Page 25 of the Examiner's original report, the Express Agency has in practice considered itself free to terminate its relationship with a joint agent for reasons not founded upon a precedent breach of contract by the joint agent. It is normally characteristic of contracts establishing an independent contractor relationship that they may be terminated for breach, by mutual consent, or in accordance with terms agreed upon in the contract itself; it is normally characteristic of the master and servant relationship that it may be terminated upon the will of either party with or without cause; in either case the relationship is basically contractual and the Express Agency's reference to the discharge of a joint agent as "termination of the contract" does not distinguish the transaction in any way from the discharge of an ordinary employee.

In its last analysis, the argument of lack of authority to enforce compliance with directions as to means and methods is predicated upon lack of authority to discharge or suspend from railroad service and lack of availability of some lesser forms of discipline because the relationship with the railroad company is not sufficiently flexible to permit their application. The fact that the Express Agency cannot suspend or discharge the joint agents from their railroad service, and can suspend or discharge them only by taking away the express work, does not prevent such joint agents from being employees of the Express Agency. In the case of *Linstead* v. *Chesapeake & Ohio Railway Company*, 276 U. S. 28 (1928), the Big Four Railway Company had lent to the Chesapeake & Ohio Railway Company a locomotive and a crew which the latter railway company used for transporting its own business. In holding this crew to be employees of the Chesapeake & Ohio Railway Company, the Court's opinion, by Mr. Chief Justice Taft, stated in part:

1225
> "Now the work which was being done here by Linstead and his crew was the work of the Chesapeake and Ohio Railway. It was the transportation of cars, loaded and empty, on the Chesapeake & Ohio Railway between Stevens and Cincinnati. It was work for which the Chesapeake & Ohio road was paid according to the tariff approved by the Interstate Commerce Commission; it was work done under the rules adopted by the Chesapeake & Ohio Railway Company; and it was done under the immediate supervision and direction of the trainmaster in charge of the trains running from Stevens to Cincinnati, and that trainmaster was a superior employee of the Chesapeake & Ohio road. We do not think that the fact that the Big Four Road paid the wages of Linstead and his crew, or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Company for the performance of this particular job." (Underscoring supplied)

The Express Agency contends that it does not "hire" joint agents and reiterates the contention made in its opening brief that it cannot "promote" or "demote" joint agents. It is obvious that the joint agents are not volunteers or interlopers, but are hired by the Express Agency either directly or through the railroad company. The question of the Express Agency's power to "promote" and "demote" joint agents is fully discussed in the Examiner's Original Report (pages 25-27). The only specific exception taken by the Express Agency to this discussion is that the offering of a better position to a joint agent is not a "promotion" but is merely an offer of employment in its service, the acceptance of which would cause him to lose his railroad employment and his seniority and other rights in that service. As stated in the Examiner's Original Report (page 27), the loss of railroad employment and the rights incident thereto is merely a circumstance to be considered by the joint agent in deciding whether or not to accept the position offered. The same consideration would be invovled in the case of any individual in the joint service of two or more employers, even though such individual is admittedly subject to control as to the manner of rendition of all his service and is, therefore, an employee with respect to each of his employers.

In the case of *Lockwood v. American Express Company*, 76 N. H. 530, 85 Atl. 783 (1913), an individual who had not been "hired" by the express company and who
1226 was no more subject to "promotion" or "demotion"
in express service, or eligible for vacations, pensions, or other employee benefits, than the joint agents involved in this proceeding was held to be an employee of American Express Company, a predecessor of the Express Agency. In that case, a railroad company and the express company, were represented at a railroad station at Claremont Junction, N. H., by Ramsey, a joint agent. Perkins, an employee of the railroad company, was in the habit of assisting the joint agent in handling express matter. The joint agent customarily left the station at 5:00 P. M., and from that time Perkins was the only person there who customarily

handled the express matter. Perkins was paid by the railroad company and received no compensation whatever from the express company. One evening, while Perkins was handling express matter, he caused injury to a brakeman of the railroad company, who sued the express company. The express company defended on the ground that Perkins was an employee of the railroad company, and was not its employee. However, the Court held that Perkins, although paid solely by the railroad company, was, while performing express service, an employee of the express company. It is significant that although, as stated in the Examiner's original Report (pages 2, 3) the facts shown by the record with respect to the joint agents have existed without substantial change, except in volume, at least since 1892, the express company did not contend that Ramsey, the joint agent, was an independent contractor in charge of the express business at that station and, therefore, that he was responsible for Perkins' negligence, but apparently assumed that Ramsey was its employee and that the only issue was whether Perkins, to whom it paid no compensation, was its employee or that of the railroad company.

The Express Agency appears to place great reliance on a contention that the joint agents are not required to perform the express service themselves, but are only required to see to it that the service is performed. This contention was made by the Express Agency in its opening brief and was fully discussed on pages 27-30 of the Examiner's original report. One of the points in that
1227 discussion was that Rule No. 820 of the Express
Agency's "General Rules and Instructions" reads as follows:

> "No employee is permitted to delegate to another person any portion of his duties, unless authorized to do so by his superior officer."

The Express Agency states (on brief) that this rule does not apply to joint agents and never has been applied to them. The rule on its face applies to any "employee." While the Express Agency now contends that joint agents are not "employees," within the meaning of the Act, there is no evidence that, at or since the time Rule 820 was adopted, joint agents were not considered "employees" within the scope of that rule. Indeed, after the passage of the 1934 Railroad Retirement Act, the Express Agency instructed joint agents to deduct contributions from their commissions although the Act required contributions to be deducted only from the compensation of "employees." With respect to the actual practice under Rule 820 the Express Agency states that at the rehearing Messrs. Gregory and Hazen testified that when they left their agencies for the purpose of coming to Washington to act as witnesses, "they did not consult any person connected with the Express Agency relative to who should conduct the express business in their absence." (Page 16, last brief.) However, the record shows that, although Messrs. Gregory and Hazen may have temporarily suspended their own service without consulting the Express Agency, they had no voice in the selection of a substitute, such selection having been made by the railroad company. Therefore, it does not appear that Gregory and Hazen were authorized or required to "delegate to another person" any portion of their duties, or to "see to it" that the service be performed by any other person. The duties of Gregory and Hazen, with respect to the Express Agency, were merely to act as express agent, and whenever they wished to be absent from the agency, it was necessary for them to obtain permission from the railroad company, which then "delegated" the work to some other person and "saw to it" that the work was performed. Whether the railroad company was authorized by the Express Agency to engage

a substitute does not appear; however, this is not ma-
1228 terial to the question whether Gregory and Hazen were authorized or required to delegate their express work to another person or to "see to it" that this work be performed during their absence. Moreover, the fact that the selection of the substitute was made by the railroad company and not the joint agents is indicative of a non-independent status on the part of the joint agents because it is unreasonable to believe that if they were to be held responsible for results as independent contractors, they would have had no voice in the selection of those for whose actions they were to be held responsible.

The Express Agency in its last brief (page 20) makes the statement that

> "No common-law rule exists by which can be ascertained with mathematical certainty the extent of control which the principal party must exercise to make an employee of an individual doing work he has contracted to have performed. But we can say that we have found no reported case holding as an employee a person who, without the authority of his principal, could have the work he had contracted to have performed done by others whom he employed, paid and discharged and over whom he had complete and exclusive jurisdiction as to their work."

and quotes from the opinion in the case of *Simonton* v *Morton*, 119 Atl. 732. This case and the excerpt quoted in the Express Agency's brief were fully discussed in the Examiner's original report (pages 28, 29) and the case was there distinguished on several grounds from the case of the joint and merchant agents. As a matter of fact there are a number of cases holding that individuals employing others at their own expense may be employees. Thus, in the case of *Adams Express Co.* v. *Schofield*, 11 Ky. 832, 64 S. W. 903, a firm, Owens & McKinney, wh acted a agent of the Adams Express Co. (predecessor o the present Express Agency) at Shelbyville, Ky., furnished at their own expense a driver and horse for the purpose of transferring express shipments between the railroad station and the express office. It was stated in the Court's opinion that the Company had no control over the selection of the driver or the management of the wagon (which was the property of the company). While transporting express, the driver caused injury to a third person, who sued the company. The company contended that the 1229 agent was an independent contractor because the agent furnished both the driver and the horse, and the company had no control over the selection of the driver or the management of the wagon, and that the driver was not its employee, but an employee of the agent. The Court held that both the agent and the driver were employees of the company.

In the case of *Schnable v. C. C. C. & St. L. Ry. Co.*, 102 Ohio St. 97, 130 N. E. 510 (1921), a railroad company, after having refused to employ a helper for a station agent, gave the agent permission to take into his office a person to learn telegraphy and to assist the agent in performing his duties. The agent thereupon took into his office one Schnable who, while engaged in assisting the agent in his railroad service, was injured. Schnable sued the railroad company. The lower Court nonsuited the plaintiff. On appeal, this judgment was reversed, the Court holding that there was sufficient evidence to take to the jury the question whether the plaintiff Schnable was an employee of the railroad company.

In the case of *Waldron v. Garland Pocahontas Coal Co.*, 89 W. Va. 426, 109 S. E. 729 (1921), a Mr. Thompson was engaged by a mining company to perform part of the operation of driving an entry into a coal mine. The Company, during the daytime, drilled holes for the explosive, and Thompson furnished explosives, shot them at night, and hauled the rock out of the mine by means of cars and horses furnished by the Company. Thompson hired and discharged the men engaged in this operation, and they were paid out of the $4.00 per yard which Thompson received from the Company. One of the men engaged by Thompson was injured, and he sued the Company. It was held that Thompson was not an independent contractor, and that both he and the men engaged by, and working under, him were employees of the Company.

Even if one were to agree, notwithstanding the cases above discussed, that it is anomalous for an employee to have under his jurisdiction persons engaged by him without specific authority from his employer, it should nevertheless be noted that the situation would be no more anomal-
1230 ous than the proposition for which the Express
Agency contends. As has been pointed out above, at page 7, joint agents are in some cases given supervisory jurisdiction over individuals who are unquestionably employees of the Railway Express Agency. Supervisory jurisdiction over employees of the principal is certainly not a usual feature of an independent contractor's relationship.

The Express Agency contends that the language of Sections 1(b) and 1(c) of the Act contemplates "the service of the individual and not the service which the individual or a company contracts to have performed." It is fairly clear that the Act includes as employees individuals, and not companies. However, there is nothing in the Act requiring an individual, in order to be an employee, to be engaged by an employer, paid by an employer, or subject to discharge by an employer. Likewise, the fact that service is rendered under a contract "to have [service] performed" does not, under the Act, nor at common law, necessarily prevent the individuals rendering service under that contract from being employees. If an employer has a contract with a company, then the company as such is not an employee under the Act, but the individuals rendering service under the contract are employees if the employer has the right to supervise and direct the manner in which their work shall be performed. If the employer's contract is with an individual, then this individual, as well as the individuals engaged by him to render service under the contract, may be an employee under the Act with respect to such service as he personally performs. In this connection, see *Adams Express Co.* v. *Schofield; Schnable* v. *C. C. C. & St. L. Ry. Co.;* and *Waldron* v. *Garland Pocahontas Coal Co.,* all cited *supra.*

The Express Agency contends that Section 1(b) of the Carriers Taxing Act of 1937 defining employment relation shows that the kind of service contemplated by the Act is the service of an individual who is given furloughs or leaves of absence in accordance with Section 1(b), and that joint agents are not given furloughs, are not subject
1231 to call for service within or outside the United States,
do not hold themselves ready and willing to serve, and never are required to obtain leave of absence from the Express Agency. The Carriers Taxing Act is not directly involved in this proceeding. However, considering the same contention with respect to the similar provisions of the Railroad Retirement Act, it appears that Section 1 (c) specifically provides when an individual is in service, Section 1 (d) specifically provides when an individual is in an employment relation, and Section 1 (b) specifically provides that the term "employee" shall include both individuals in service and individuals in an employment relation. It is clear that the employment relation provisions were intended to broaden the scope of the term "employee" and that they were not intended to limit or restrict the clear and specific provisions of Section 1 (c) with respect to service.

The Express Agency contended in its opening brief that the joint agents furnish to the Express Agency the use of the railroad company's premises. This contention was discussed in the Examiner's original report in which it was shown that the use of these premises is not furnished by the joint agents, but is secured by the Express Agency through its written agreement with the railroad companies. The evidence on rehearing shows that, in determining rates of pay for railroad service rendered by joint agents, consideration is given to the average amount of express commissions which the joint agent is expected to receive, and that when an express agency is withdrawn from a station, the joint agent's subsequent pay for his railroad service is not based upon the amount of express commissions he was receiving, but upon the rate of pay received at other railroad stations of similar importance at which there is no express agency. The evidence upon this point was strenuously objected to by the Express Agency on the ground that it was irrelevant and immaterial, but the objection was overruled by the examiner and an exception to the ruling noted. (R. 94-100) In view of this evidence, the Express Agency now contends that the difference between the rate of pay for railroad service when express business
1232 is not handled and the rate of pay for railroad service when express is handled is "in the nature of rental he (the joint agent) pays the railroad for the use of its facilities in conducting express business." However, as pointed out on pages 20-21 of the Examiner's original report, the railroads make these premises available directly to the Express Agency through a specific contract between them which is in the record; consequently, whatever the reason for the differential may be, it can not be "in the nature of rental." The complete elimination of the differential by agreement between the railroads and the agents could not affect the railroads' obligation to furnish the

premises in accordance with their contract with the Express Agency. The Express Agency emphasizes (Brief, pp. 4, 10) the smallness of the compensation received by the joint agents for their express service and states that the express commissions received by joint agents and merchant agents represent gross income out of which, in order to determine the agent's "compensation earned" for services rendered, there must be deducted "the overhead cost of operating the business, such as rental value of the space occupied by the office of the Agency and the cost of labor employed by the agent in performing or in assisting in performing express work." The Express Agency contends that this will result in accounting confusion and expense not justified by the amount of the tax collected. While the Carriers Taxing Act is not directly involved in this proceeding, the employee coverage language in that Act is similar to that in the Railroad Retirement Act. If this contention is intended to mean that joint agents are to be excluded from employee coverage because of the smallness of their compensation for express service, it must also mean that the Act excludes any employee, joint or otherwise, whose compensation is small in amount, because the language of the Act makes no distinction between joint and non-joint employees. However, the Act does not draw any line between "small" compensation and compensation which is not "small," and it would obviously be impossible for the Board to attempt to draw such a line. Furthermore,
1233 the Act evidently contemplates small amounts of compensation in view of the minimum annuity provisions of Section 3 (e) and in view of the provisions of Section 3 (i) with respect to the payment of annuities of less than $2.50. On the other hand, if the Express Agency's contention is intended to mean that joint agents are to be excluded from employee coverage because they are joint employees, that is, employees of two or more

employers, it would not be possible to restrict such an interpretation to the express service of the joint agents involved in this proceeding, but there would also have to be excluded the railroad service of these joint agents and all the service of all other joint employees, whether of the Express Agency and one or more railroads, or of two or more railroads. When it is considered that the "employee" definition of both Acts specifically includes any individual "in the service of one or more employers for compensation," it is obvious that joint employees as such were not intended to be excluded.

As for the deductions which the Express Agency states would have to be made in order to determine the agent's net compensation, the Board has heretofore ruled that expenditures by an employee out of his gross compensation for the services of assistants, or materials and supplies, in connection with the employee's service as an employee, are to be deducted in determining the net compensation which is creditable. In determining the net compensation of joint agents and merchant agents, it does not appear that any unusual difficulty will be encountered. As shown in the Examiner's original report, and again in the next to the last paragraph above, the joint agent does not furnish premises to the Express Agency, but the Express Agency itself secures the use of the premises from the railroad company. In the case of the merchant agent, who does furnish the use of premises, the record shows that he does not receive any rent or other payments for these premises, since his rate of compensation (normally 10%) is exactly the same as that of the joint agent who does not furnish
the use of premises and whose duties with respect
1234 to express service are no different from those of the
merchant agent. Therefore, no deduction on account of rental value is to be made. Likewise, no deduction is to be made on account of services performed gratuitously

by relatives or friends of the agent, because in such cases it is clear that all of the express commissions represent compensation for the agent's personal services. Such cases are no different from the case of an exclusive commission agent, or other admitted employee, who happens to have a relative or friend gratuitously assist him in rendering his service for the employer. Nor is any deduction to be made on account of persons in the agent's general employ who happen to do some work for the agent in connection with the agent's express service.

The Express Agency refers to a statement on Page 10 of the Examiner's original report that "* * * the general character of the business of the Express Agency makes it almost imperative that it reserve the right to control its agents as to method and detail, whether they be joint agents or exclusive agents," and states that the Examiner thereby "seems to intimate that the law prohibits the engagement of anyone or anybody other than an employee to conduct the affairs of a transportation agency subject to the Interstate Commerce Act." No such intimation was made. The purpose of the above-quoted statement from the original report was, as shown by the report, to point out the fact that as a matter of practical necessity, the Express Agency reserves the right to control its agents, joint or otherwise, as to method and detail. The practical necessity for such control is not denied by the Express Agency, but, on the contrary is emphasized as the reason for the detailed control prescribed in its rules.

In view of all the foregoing, I am of the opinion that nothing in the evidence presented at the rehearing or in the arguments made by the parties affords any reason for changing or modifying the conclusion reached, with respect to joint agents, in my original report.

1235

2. Merchant Agents.

The evidence* on rehearing substantially confirms the statement made in the Examiner's original report that "the only factual differences between these merchant agents and joint agents is that the former are engaged in independent businesses of their own, rather than as employees of another company, that their service for the Express Agency is to be performed to some extent on their own premises instead of on the premises of the railroad company, and that with respect to their own businesses, they, themselves, set the hours and working conditions, while the joint agents, with respect to their railroad company service, have their hours and working conditions set by the railroad company."

Thus, they and the joint agents sign the same "Application for Employment." including the same "Application for Fidelity Bond, etc.," and the same Form 95, are paid compensation on a commission basis, usually at the same rate, have the same duties, and are furnished with, and are bound to comply with, the same Rules and Regulations which Rules and Regulations are subject to change from time to time and are applicable to them on the basis of the same considerations.

The amount of commissions received by approximately 1,000 merchant agents who do not render service to railroads are substantially the same as the amount received by the joint agents, while the amount received by the nearly 400 merchant agents who also render service to railroads were substantially less than the amounts received by the joint agents. This difference, however, is not material to the issue here involved.

Like the joint agents, the merchant agents are required by the Express Agency to meet trains at any time, even outside the regular business when the nature of the express shipments make it necessary (as in the case of perishable foodstuffs), and lose the agency if they fail to meet trains or handle express business as required.

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* The evidence with respect to Barney B. Roberts is discussed hereinafter on Pages 36-37.

1236 As in the case of joint agents, the merchant agents usually perform the express service themselves, although in unusual situations they may have relatives or other persons assist them in performing their service. The record does not show whether these assistants are always compensated by the agents.

In view of the foregoing, the discussion under joint agents with respect to those facts which are common to the joint agents and the merchant agents is applicable to the merchant agents.

The only differences between the merchant agents and the joint agents which merit consideration are (1) a few (twelve) of the merchant agents may be companies, rather than individuals, while it does not appear that any of the joint agents are companies, and (2) many of the merchant agents are engaged in independent businesses of their own performing the express business on their own premises. As stated on page 28 of this report, the mere fact that an employer's contract is with a company does not necessarily prevent individuals rendering service under the contract from being employees under the Act. Indeed, in the case of *Adams Express Company* v. *Schofield*, cited on page 26 of this report, a firm, Owens and McKinney, acted as agents for the Adams Express Company and also furnished a horse and driver for the hauling of express shipments. This agent apparently was a merchant agent. The court held that the agent and the driver were employees of the Express Company. There is no evidence in this proceeding as to which individuals engaged by the (possibly) twelve companies are employees under the Act. Since the purpose of this proceeding is to determine the status of merchant agents as a class, and these twelve cases are exceptional rather than typical, it is not necessary to express an opinion as to the status of the individuals involved in these cases.

The second difference between merchant agents and joint agents, that is, that many of the merchant agents are engaged in independent businesses of their own performing express service on their own premises, was discussed at length in the Examiner's original report. If being
1237 engaged in an independent business prevents a merchant agent being an employee of the Express Agency no reason is perceived why a joint agent engaged in an independent business would not thereby be prevented from being an employee of the railroad also; yet, as the Express Agency points out at page 3 of its last brief, 387 joint agents are engaged in independent pursuits, and it has never been suggested that this factor prevents their being employees of the railroads. It may be of interest to note in this connection that a substantial number of those listed by the Express Agency as merchant agents are not engaged in independent businesses of their own, but are employees of other business concerns, such as packing concerns, coal concerns, and others.

As stated in the Examiner's original report, it is reasonable to believe that the merchant agents were not intended to be any more independent with respect to the manner in which they conduct their express service than the joint agents, unless there are differences between the merchant agents and the joint agents which would cause the Express Agency to intrust them with greater independence of control than is intrusted to the joint agents. In this connection, the reasons given by the Express Agency for engaging merchant agents are significant. The reason given for engaging merchant agents rather than exclusive agents is that the communities in which the merchant agents are engaged are so small that there is not enough express business to justify engaging a full time agent. The reasons given for engaging merchant agents rather than joint agents are, in summary, simply that it was impossible or inconvenient to have the express service performed by a joint agent. It is obvious that these reasons do not furnish any motive for the Express Agency to intrust the merchant agents with more independence of control than the joint agents.

As shown in the Examiner's original report, the fact
that a merchant agent is engaged in an independent business
of his own is no indication that he is independent with
respect to the manner of performing his express service.
The conducting of an independent business by a person
engaged to render service is a factor indicating independence
with respect to that service only when that
1238 service is of the same kind as the business in which
the person is independently engaged. In the case
of *Pittsburgh V. F. Co.* v. *Gallagher*, 32 F. (2d) 436, an
individual who was employed as a laborer and who was
also employed for an agreed compensation to transport
other workmen in an automobile furnished by him, was
held to be an employee and not an independent contractor
with respect to this transportation service. The court's
opinion said that one of the factors to be considered in
determining whether a "master and servant" relationship
existed was, "whether the alleged independent contractor
is in fact engaged in any distinct business or occupation
(such as building, transportation by rail, street car, or
bus, general contracting, etc.) in the field in which he contracts."
(Underscoring supplied.)

Extensive testimony was given with respect to Barney B. Roberts. It was not testified that Mr. Roberts is typical of the merchant agents as a class, and the evidence shows that he is not typical of them. The typical merchant agent

is engaged only to receive and deliver express shipments, handle such shipments to and from trains, collect transportation charges, and make necessary remittances and reports to the Express Agency. In some instances, they also perform pick up and delivery service, but it does not appear whether in those instances they are engaged in operating an independent drayage business in the course of which the pick up and delivery express service is performed. Mr. Roberts, on the other hand, not only performed pick up and delivery service, but was also engaged in operating an independent drayage business in the course of which he performed the pick up and delivery service and, in addition, performed, in the course of his drayage business, a major transfer service for the Express Agency by transferring express shipments a distance of about 7 miles between two cities. Likewise his compensation was unlike that of the typical merchant agent, since he received a flat amount of $134.00 monthly for his service as agent, a flat amount of $90.00 per month for his transfer service, and a 15 per cent commission for the pick up and delivery service. The typical merchant agent received ten per
1239 cent commission for his service as agent. Still another significant difference between Mr. Roberts and the merchant agents is the fact that Mr. Roberts made it an express condition of his employment with the Express Agency that he be free to be absent from the agency whenever he desired and to select a substitute to render service in his stead, whereas there is no evidence whatever that such an express condition is made when a typical merchant agent is employed.

It is possible that Mr. Roberts is not an employee with respect to his pick up and delivery and transfer service and, at the same time, that he is an employee with respect to his service as agent. See 34 Corpus Juris 1323 (§ 1529). However, it is not necessary to express an opinion as to the status of Mr. Roberts because he is not typical of the class of merchant agents, and the purpose of this proceeding is to determine the status of merchant agents as a class.

In view of the foregoing, I am of the opinion that merchant agents, as a class, are, while rendering service as agents, employees of the Express Agency, within the meaning of the Act. No opinion is expressed as to whether those merchant agents who also perform pick up and delivery service are, while performing such pick up and delivery service, employees under the Act or whether individuals rendering service under an arrangement whereby a company is designated as agent are employees under the Act. The status of such merchant agents and individuals should, in my opinion, be determined on the basis of the facts in each particular case.

Lester P. Schoene,
Examiner.

1308 Form No. G-21

This form is to be used only by the Secretary of the Board or as otherwise specifically directed by the Board.

Transcript No. Special Page 1 of 2 Pages

Date Transcript Released

United States of America.

RAILROAD RETIREMENT BOARD

Transcript of Board Orders

I certify that the following is a true and correct transcript of Board order(s) numbered 39-502, transcribed from the record of proceedings of August 1, 1939.

Mary B. Linkins,
Secretary of the Board.

B. O. 39-502

Rendering opinion on the creditability, under the Railroad Retirement Acts of 1935 and 1937, of service to the Railway Express Agency, Inc. and its predecessors, by certain individuals who devote substantial portions of their time to other occupations, particularly railroad service: Jurisdictional Docket No. 2.

On the basis of the opinion filed herewith, 1-39-542, the questions stated in the Board order dated October 28, 1937 are decided as recommended by the Examiner in his report of March 19, 1938 supplemented by his report on the rehearing of August 5, 1938; and the Board hereby formulates the following rulings with respect to those questions:

(a) The individuals described as "joint agents" or as "merchant agents," whether paid on a commission basis or a "fixed allowance" basis, are, while rendering service to the Express Agency, "in the service of" the Express Agency, within the meaning of Section 1(c) of the Railroad Retirement Acts of 1935 and 1937; such individuals are therefore employees under the Railroad Retirement Act of 1937; and they are also employees under the Railroad Retirement Act of 1935 if they were on or after August 29, 1935, in the service of or in an employment relation to the Express Agency, or were otherwise employees as defined in that Act;

(b) The time devoted by such individuals to the performance of their duties for the Express Agency is creditable as service toward annuities under the Railroad Retirement Acts of 1935 and 1937, subject to provisions of said Acts pertaining to the creditability of service toward annuities;

(c) This decision does not apply to cases in which a company or other entity not an individual is designated as agent of the Express Agency; in such cases, an investigation will be made to determine which individuals, if any, are rendering service subject to the continuing authority of the Express Agency to supervise and direct the manner of rendition thereof. Nor does this decision determine whether a joint or merchant agent who also performs pick-
up and delivery service for the Express Agency is,
1309 with respect to such pick-up and delivery service, an
"employee" within the meaning of the Act of 1935 or 1937; the status of such agents with respect to such pick-up and delivery service will be determined on the basis of the facts in each particular case.

1310 **Jurisdictional Docket No. 2**
L-39-542.

Railroad Retirement Board

Washington, D. C.

OPINION OF THE BOARD.

1311 By an order dated October 28, 1937, the Railroad Retirement Board directed Lester P. Schoene, Esq., as General Counsel of the Board, to hold a hearing and to act as Examiner of the Board, to receive arguments and thereafter to formulate findings of fact and conclusions of law to enable the Board to make proper answer to the following questions:

> "Are persons performing duties for the Railway Express Agency in return for compensation on a commission basis, and who devote substantial portions of their time to other occupations, particularly railroad service, to be classified as employees under the Railroad Retirement Acts of 1935 and 1937?
>
> "Is the time devoted to the performance of such duties for the Railway Express Agency, or its predecessors, creditable as 'service' toward annuities under said Acts?"

In accordance with that order, a hearing was held on December 15, 1937, at the Board's offices in Washington, D. C., in which hearing the Railway Express Agency, Inc. (hereinafter referred to as the "Express Agency"), the Order of Railroad Telegraphers and The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees participated. Two representatives of the Bureau of Internal Revenue entered appearances at the hearing but did not otherwise participate in the proceedings. Subsequently, a brief was filed by the Express

Agency and a joint brief was filed on behalf of the Order of Railroad Telegraphers and The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. The parties wished to present oral argument in support of their respective positions, and such argument was heard on January 17, 1938, at the offices of the Board, in which argument the Express Agency and the Order of Railroad Telegraphers participated.

1312 Transcripts of the proceedings at the hearing and the oral argument were submitted to the Board, as were the briefs filed by the respective parties, and, on March 19, 1938, the Examiner submitted to the Board his report, including discussion of the evidence, findings of fact, conclusions of law, and recommendation for decision. The Board examined the above documents and considered the entire evidence, the arguments of the respective parties and the report of the Examiner. Thereafter, on March 24, 1938, the Board made the following decision:

> "(1) The Board approves and adopts the findings of fact made by the examiner; (2) The Board approves and adopts the conclusions of law reached by the examiner; (3) The Board adopts the report of the examiner as its opinion in the disposition of the matter; and (4) The Board decides the questions stated in its order of October 28, 1937, as recommended by the examiner in his report of March 19, 1938, formulating the following rulings with respect thereto:
>
> > (a) The individuals described as 'joint agents' or as 'merchant agents', while rendering service to the Railway Express Agency, Inc., are 'in the service of' the Railway Express Agency, Inc., within the meaning of Section 1 (c) of the Railroad Retirement Acts of 1935 and 1937; such individuals are therefore employees under the Railroad Retirement Act of 1937; and they are also employees under the Railroad Retirement Act of 1935 if they were on or after August 29, 1935, in the service of or in an employment relation to the

> Railway Express Agency, Inc., or were otherwise employees as defined in that Act; and
>
> (b) The time devoted by such individuals to the performance of their duties for the Railway Express Agency, Inc., is creditable as service toward annuities under the Railroad Retirement Acts of 1935 and 1937, subject to provisions of said Acts pertaining to the creditability of service toward annuities."

By letter dated April 16, 1938, counsel for the Express Agency took exception to the Examiner's report in certain respects and requested leave to present additional facts before the Examiner and thereafter leave to argue the issues before the Board in banc. The Board gave full
1313 consideration to this request and, on May 31, 1938, entered the following order:

> "It is hereby ordered and directed (1) that Jurisdictional Docket No. 2 be reopened with leave to all parties who have entered appearances in the matter to present further evidence and arguments before the Examiner on June 20, 1938, or such other date as the Examiner may fix to meet the convenience of all parties, upon the questions constituting the subject matter of the inquiry;
>
> (2) That the evidence be directed so far as possible to the presentation of evidence not heretofore in the record, that repetition be avoided, and that argument be directed to new matters and toward such specific matters in the Examiner's report as are claimed to be in error;
>
> (3) That particular attention be directed to the presentation of more complete evidence regarding the status of merchant agents;
>
> (4) That decision be reserved upon the question whether argument before the Board in banc shall be permitted."

Pursuant to the above order, the Examiner held a hearing on August 5, 1938, in the offices of the Board at Washington, D. C., in which hearing the Express Agency and the Order of Railroad Telegraphers participated. At the conclusion of the hearing, it was agreed that a proposed report be issued by the Examiner, on the basis of which both parties to the hearing would be given an opportunity to file exceptions and to request oral argument on the exceptions before the Board. Briefs were filed by the Express Agency and the Order of Railroad Telegraphers, respectively. Thereafter, a transcript of the proceedings at the rehearing, and the Examiner's report on that hearing, were submitted to the Board. The Express Agency filed exceptions to this report and requested oral argument before the Board. The Order of Railroad Telegraphers filed a reply to these exceptions. Oral argument before the Board was held on June 9, 1939, at the offices of the Board, in which argument the Express Agency and the Order of Railroad Telegraphers participated.

1314 The Board has examined the transcripts, briefs, exceptions, reply and Examiner's report relating to the rehearing, and has given consideration to the entire evidence at both hearings, all the arguments of the respective parties and both reports of the Examiner.

The Express Agency's exceptions to the Examiner's report may be briefly discussed:

1. (Exceptions 1 and 20.) The Express Agency objects to the Examiner's finding (Report on rehearing, p. 7) that joint agents are in some cases given jurisdiction over employees of the Express Agency, by pointing out that this finding is based on the testimony of two express agents; that one of these was paid on a "fixed allowance" rather than a commission basis; and that the individual supervised by the other agent was not shown to have been an employee as distinguished from an independent contractor. That the first agent was paid on a "fixed allowance" rather than a commission basis is immaterial because the record shows

that, except as to form of compensation, there is no material distinction between joint agents paid on a commission basis and those paid on a "fixed allowance" basis. That the individual supervised by the other agent was not shown to have been an "employee" is also immaterial, because the individual whose status is in question is the agent, rather than the individual supervised by him, and the fact that the agent performed acts of supervision over another individual rendering a service to the Express Agency tends to show that the agent is an "employee" of the Express Agency.

2. (Exception 2.) The Express Agency objects to the Examiner's finding (Report on rehearing, p. 7) that in some cases joint agents have been required by the Express Agency to render service outside regular hours and in such
cases have been compensated by the Express Agency
1315 at one and one-half times railroad rate of pay. The
Express Agency's exception is (1) that this finding is not material, (2) that the testimony on which it is based is hearsay, and (3) that the testimony concerns a period of years removed from the time here involved. As to (1), the materiality of the finding is obvious; it shows a situation not normal to an independence contractor's relationship, in which the alleged contractor is required by his relationship to perform work for which he is compensated in a manner usual to the compensation of an employee. As to (2), the testimony on which the finding is based is that of the Vice-President of the Order of Railway Telegraphers, who was placed by the President of that organization in full charge of matters effecting joint agents. No exception to the competency or materiality of the testimony was raised by the Express Agency at the hearing. Consequently, the exception comes too late. Furthermore, there is nothing in the testimony indicating that it is hearsay, and considering the witness's official capacity with the

Order of Railway Telegraphers, the testimony must be regarded as based on his personal knowledge or on information secured in his official capacity with that organization. Even if the testimony be regarded as technical hearsay, it, nevertheless, in view of the position and experience of the witness, has probative value, especially when not contradicted by other evidence. In hearings of the Board the technical rules of evidence do not have absolute application. Finally, as to (3), although the testimony relates to events which occurred in 1924 and 1931, there is nothing in the record to show that the same practice has not continued to the present time. Furthermore, the time involved in this proceeding is not merely the present, but the entire period during which the Express Agency and its predecessors have had joint agents and merchant agents in their service, which period goes back to 1892. The record shows that there have been no significant changes of the practices
1316 regarding joint agents in this entire period.

3. (Exception 3.) The Express Agency objects to the Examiner's finding (Report on rehearing, pp. 7-8) that when a joint agent wishes to be absent from his duties as joint agent he secures permission from an official of the railroad company, and that he has no voice in selecting a substitute, such substitute being selected by the railroad company. The Express Agency does not question the accuracy of the finding but contends that it should also include a finding that it (the Express Agency) has no voice in the selection of a substitute, citing pages 88 and 89 of the record on rehearing. The testimony referred to shows only that when a joint agent wishes to be absent from duty, there is no representative of the Express Agency on the premises to whom he applies for permission, but the railroad company makes arrangements for a substitute. While this testimony does not show that the Express Agency does have a voice in selecting a substitute, it would not support

a finding that the Express Agency does not have such a voice, since there is nothing to show that the railroad company was not authorized by the Express Agency to select a substitute on its behalf, and the Express Agency nowhere contends that a substitute so appointed by the railroad company is a volunteer or interloper, not authorized to act as express agent on its behalf.

5. (Exception 5.) The Express Agency objects to the Examiner's finding (Report on rehearing, p. 9) that the extent of reduction in a railroad agent's rate of pay, which usually occurs when the railroad agent is appointed to act also as express agent, is determined "by considering the express and railroad service as the service of a single position, by considering the aggregate compensation for both services as the compensation for that position, and by considering what aggregate compensation for both 1317 services would be reasonable for the express and railroad duties combined." The Express Agency's exception is merely that "the evidence is that although the work performed by the agent for the railroad may remain the same, in the event he gains or loses an express agency his railroad pay is subject to adjustment to conform to comparative rates paid at similar offices." There is no inconsistency between the Examiner's finding and the Express Agency's statement of what the evidence shows, since the Examiner's finding merely expresses what is implicit in the Express Agency's statement. Both the finding and the Express Agency's statement appear to be based on Rule 20 of the basic rules promulgated by the U. S. Railway Labor Board in Decision Number 757, which rule was ordered to be, and was, incorporated into the various collective agreements by the Order of Railway Telegraphers and the various railroads. The rule reads as follows:

> "Rule 20—When express or Western Union commissions are discontinued or created at any office, thereby

> reducing or increasing the average monthly compensation paid to any position, prompt adjustment of the salary effected will be made conforming to rates paid for similar positions." (Underscoring supplied.)

This rule obviously regards the express duties and railroad duties at any point as comprising the duties of a single "office" or "position."

6. (Exception 6.) The Express Agency refers to the statement in the Examiner's report (report on rehearing, p. 11) showing what percentage of the various agents involved in this proceeding earned commissions during the month of March, 1937 amounting to $5.00 or less, what percentage earned $5.01 to $10.00, what percentage earned $10.01 to $50.00, and what percentage earned from $50.01 to $250.00 or over. The Express Agency's exception is merely to the effect that there should also have been included a statement of the percentage who earned commissions of $1.00 or less. There does not appear to be any purpose for specifying in great detail the amounts of commission earned, and the Express Agency does not give
1318 any reason for including the statement suggested
by it.

7. (Exceptions 7, 8, 10, 11, 13, 14, 18, 19, 21, 25 and 26.) The Express Agency has relied heavily on a contention that joint and merchant agents are not required to perform their express duties personally, but that they may, and frequently do, employ on their own account other persons to assist them. This contention has been fully discussed on pages 27-30 of the Examiner's original report and pages 24-28 of his report on rehearing. The Examiner's discussion shows (1) that Rule 820 of the Express Agency's Rules and Regulations prohibits joint and merchant agents from delegating any of their duties without authority from a superior officer of the Express Agency, (2) that the small amount of express business prevailing at the points where

joint and merchant agents render their service shows that they do not require, and are not expected to utilize, the services of other persons except in rare and unusual situations, (3) that, as a matter of fact, it is only in rare and unusual situations that joint and merchant agents engage other persons to assist them, and (4) that in any event power to engage assistants is only one factor to be considered in determining the status of an individual, there being cases in which individuals having such power were held to be "employees" rather than independent contractors.

In the exceptions, the Express Agency, cites testimony of Mr. Walter H. Huff, Superintendent of the Maryland-Pennsylvania Division for the Express Agency. Mr. Huff's testimony consists principally of a description of a number of specific examples of merchant agencies, not stated to be typical and described by Mr. Huff as "unusual" situations, at some of which agencies relatives of the agent or other persons assist in performing the express service. Following this testimony, Mr. Huff stated that it is "common for the agent to be assisted by people in his service or by members of his family." As against this is testimony of Mr. Paul Gross, Jr., General Auditor for the Express Agency, and Mr. W. W. Owens, Vice President
1319 with jurisdiction over the territory generally
south of the Ohio and Potomac Rivers, East of the Mississippi River, including Cuba, Missouri, Arkansas, and part of Maryland, Ohio, Indiana, Illinois, and Louisiana. This testimony is to the effect that there is usually one man at the agency and that there are very few occasions when the agent employs other help. In view of this testimony of high officials of the Express Agency, the statement of Mr. Huff, whose jurisdiction was far more limited, can only be interpreted as based on the relatively small number of "unusual" situations described by him.

The Express Agency also cites in support of this exception testimony concerning Barney B. Roberts. Although the Examiner expressly found (report on rehearing, p. 36) that Mr. Roberts was not typical of merchant agents as a class, the Express Agency took no exception to this finding. In oral argument on June 9, 1939, counsel for the Express Agency asserted that Mr. Roberts is typical and that, "if there is any question about it" counsel would "like to have the opportunity to call a number of merchant agents to show that the conditions depicted by Mr. Roberts are typical." In view of the Express Agency's failure to include this contention in its exceptions, the contention is not properly before the Board for consideration, Regulations Sec. 250.15. However, disregarding the irregularity of the contention, there is no testimony that Mr. Roberts is typical, and the record shows affirmatively that he differs from the typical merchant agents and joint agents in several respects. These differences would not be affected in any respect by the multiplication of cases such as Mr. Roberts. In order to establish that cases such as Mr. Roberts are typical of joint or ~~merchant agents~~, it would have to be shown that the situation of joint or merchant agents as a class is substantially the same as that of Mr. Roberts; and such a showing would involve a repudiation of testimony now in the record as to joint and merchant agents.

1320 The Express Agency attempts to distinguish some of the cases cited by the Examiner (report on rehearing, p. 26-27) in which it was held that an individual who is authorized to engage and supervise other persons on his own account may nevertheless be an "employee". In the case of *Adams Express Company v. Schofield*, 111 Ky. 832, 64 S. W. 903, an express agent furnished, at his own expense, a driver and horse for the purpose of transporting express matter and the driver caused injury to a third person who sued the express company. The court held the express company liable for the injury. The Express Agency suggests in its exceptions that the decision may have been predicated on the ground that the express company "owed a duty to the public to see that its work was properly performed" rather than on the "master and servant theory." However, an examination of the court's opinion shows that the decision was not based on any such general obligation; the Adams Express Company had contended that the agent was an independent contractor and that the driver was the agent's employee, rather than its employee; and the court, in holding the company liable held the agent, as well as the driver, to be employees of the express company.

In the case of *Waldron v. Garland Pocahontas Coal Company*, 89 W. Va. 426, 109 S. E. 729, Thompson was engaged by a mining company to perform a task requiring the services of a number of workmen, and he was authorized to hire, discharge and pay the necessary workmen. One of the individuals engaged by Thompson was injured and sued the mining company on the theory that he was an employee of that company. The court held that the plaintiff might recover; in the Express Agency's own words, "It was held in any event Thompson was an employee of the company and therefore employment by him was employment by the company." (Underscoring supplied.)
132 Thus, the Express Agency concedes the significant point of the case, i. e., that Thompson, an individual who hired assistants without specific authority from his principal and paid them out of his own funds, might nevertheless be an "employee," rather than an independent contractor.

In the case of *Schnable v. C. C. C. and St. L. Ry. Co.*, 102 Ohio St. 97, 130 N. E. 510, it was held that a helper engaged by a railroad agent, after the railroad company had itself refused to employ a helper for the agent, was an employee of the railroad company. The Express Agency attempts to distinguish this case by stating that the helper was employed pursuant to permission given the agent by his superiors. However, this permission was only general permission to the agent to take a learner into his office, and was not specific authority to represent the railroad company in engaging an employee. The situation is substantially the same as that which the Express Agency claims to exist between it and joint and merchant agents, for the Express Agency contends that it does not specifically authorize those agents to hire assistants, but that it does permit them on their own account to engage assistants for the performance of express work.

8. (Exception 9.) The Express Agency takes exception to the Examiner's finding (report on rehearing p. 13) that there is no specific ruling by the Interstate Commerce Commission as to whether merchant agents should be reported to that Commission on the form entitled "Statement of Employees' Service and Compensation for the Calendar Year   ", on the ground that "there is nothing in the record specifically to the effect that there is no such ruling by the Interstate Commerce Commission." A finding of fact is not exceptionable merely on the ground that there is no testimony "specifically" in the terms of the finding; the question is simply whether there is evidence from which the conclusion expressed in the finding
may reasonably be drawn. On page 15 of the record
1322 or rehearing there is ample evidence so supporting
the Examiner's finding.

9. (Exceptions 10 and 11.) This exception is to the Examiner's finding (report on rehearing p. 18) that the language of the Application for Employment, which is signed by joint agents and merchant agents, authorizes the Express Agency to supervise and direct those agents

as to the methods and details of their express service. The Express Agency asserts that the language of the Application relates only to results and therefore that it is expressive of an independent contractor status. The language in question is that joint and merchant agents agree to perform their duties for the Express Agency, "all as required by the rules and regulations of the Company." The meaning and effect of this language is fully discussed on pages 9-10 of the Examiner's original report and page 18 of his report on rehearing where it is shown (a) that the language on its face is broad enough to authorize the Express Agency to control the methods and details of the joint and merchant agents' express work, as well as to specify the general results they are to produce, and (b) that unless there be facts and circumstances showing that the agreement was intended to be limited to general results, it must be construed as applying to methods and details, as well. The facts and circumstances shown by the record do not warrant a limited construction of the agreement, but clearly require an interpretation that it applies to methods and details as well as results.

In support of its contention that the Application for Employment is expressive of an independent contractor status, the Express Agency states that the same form has been used "long prior to the enactment of the Railroad Retirement Act" at places were there were but few shipments daily. Even assuming that the Express Agency used the same Application form many years ago in engaging joint and merchant agents, this would have no significance as support for the Express Agency's
1323 position unless it were established that many years ago those agents were clearly and unquestionably independent contractors. However, the status of those agents as of many years ago is no less in question than their status as of the present time, and the use of the

same Application form many years ago only serves to indicate that those agents were employees in the past as well as at the present time.

10. (Exception 10.) The Express Agency refers to the Examiner's finding (report on rehearing p. 17) that, inasmuch as the Express Agency's business involves compliance with numerous regulations of the Interstate Commerce Commission, the meeting of certain obligations to its patrons and the maintenance of close harmony and cooperation with the railroad company, it is unreasonable, from a practical point of view, to suppose that the Express Agency would intend each of its 16,000 or more joint and merchants agents to devise his own methods for achieving the results desired by the Express Agency. The only comment of the Express Agency as to this is that, notwithstanding the regulations of the Interstate Commerce Commission, the Express Agency does not have "immediate direction and control" of the joint and merchant agents and their employees. This comment is merely a reiteration of the Express Agency's position that joint and merchant agents are independent contractors, and does not contain any reasoning in refutation of the Examiner's finding.

11. (Exceptions 10, 17 and 19.) The Express Agency contends that the place where the work is done is furnished by the agents rather than by the Express Agency. The discussion on pages 20-21 of the Examiner's original report, and pages 29-30 of his report on rehearing show that joint agents do not furnish the use of the railroad companies' premises, but rather that they are secured by the Express Agency through written agreement with the railroad companies. Only merchant agents furnish
1324 permission for express service, and this feature is
fully discussed on pages 34-36 of the Examiner's original report and pages 33-37 of his report on rehearing, with which discussion the Board is fully in agreement.

In support of this exception, the Express Agency presents the argument that if it were true that it arranges with the railroad companies for the use of their premises, then it would also be able to discontinue its relationship with a joint agent and, without consulting the railroad company, appoint some other person to work at the same premises. This argument ignores the simple fact that the Express Agency's contract with the railroads, by which it procures the space, is expressly limited to the situation in which an employee of the railroad company acts as agent of the Express Agency (Examiner's original report, p. 20).

12. (Exceptions 10, 16 and 17.) The Express Agency contends that it has no power to hire or discharge joint and merchant agents without losing the place where the work is performed, nor to promote and demote such agents, nor to exercise any jurisdiction over such agents with respect to hours of labor; and that this lack of power shows that the agents are independent as to the methods and details of their work for the Express Agency.

These contentions are fully discussed on pages 21-27 of the Examiner's original report and pages 21-23 of his report on rehearing, where it is shown that the Express Agency does have the right and power to do those things, although the exercise of its power might be affected by practical considerations growing out of the fact that the time of the agents in question, as well as the premises on which they work, are shared by the Express Agency with another party, and the consequent impossibility for each of the parties to exercise its authority as to promotion, demotion, hours of service, etc., with as much freedom as if it
had the exclusive right to the premises and the agent's
1325 time. The Express Agency's argument rests in the
fact that the agents in question are joint, rather than exclusive, and would lead to the conclusion that any in-

dividual serving two or more employers is by virtue of that very fact, an independent contractor rather than an employee, and therefore excluded from the scope of the Act. However, as stated on page 31 of the Examiner's report on rehearing, "when it is considered that the 'employee' definition of both Acts specifically includes any individual 'in the service of one or more employers for compensation,' it is obvious that joint employees as such were not intended to be excluded." The fact that the Express Agency might lose the use of premises in the event it terminated its relationship with a joint or merchant agent is shown by the Examiner's reports to be merely an incidental circumstance not inconsistent with an employer-employee relationship. The case of *Linstead* v. *Chesapeake and Ohio Railroad Company*, 276 U. S. 28 (1928), cited on page 22 of the Examiner's report on rehearing shows that there is no inconsistency between an employer-employee relationship and the fact that the only method of discharge is by taking away the work. The Express Agency attempts to detract from the significance of this case by stating that the individuals whose status was there in question were employees in any event, and that the question was solely whether they were employees of one company (the Chesapeake and Ohio Railway) or of another company (the Big Four road). However, the Court resolved this issue by holding that the individuals were employees of the Chesapeake & Ohio, the opinion stating:

> "We do not think that the fact that the Big Four Road paid the wages of Linstead and his crew, or that they could only be discharged by the Big Four, prevented their being the servants of the Chesapeake and Ohio Company for the performance of this particular job."

Thus, the court necessarily held that such circumstances are not inconsistent with the existence of an employer-employee relationship.

1326 13. (Exceptions 12 and 14.) The Express Agency cites a ruling of the Bureau of Internal Revenue to the effect that certain insurance agents are independent contractors. This ruling is fully discussed on pages 17-18 of the Examiner's original report and pages 18-19 of his report on rehearing, where it is shown (1) that the Bureau's ruling is based on a finding by the Bureau that the insurance company's authority to issue rules and regulations was limited to general rules and regulations such as might become necessary by reason of subsequent legislation and not going to the manner of performance of the agents' service, whereas it does not appear that there is any such limitation on the Express Agency's authority to issue rules and regulations applicable to joint and merchant agents; and (2) that the Bureau's ruling as to insurance agents could not, in any event, carry any weight in this proceeding because the Bureau has ruled as to the very joint agents here involved that they are "employees" under the Carriers Taxing Act of 1935 and the Carriers Taxing Act of 1937, the "employee" provisions of which Acts are substantially the same as those of the Railroad Retirement Act of 1935 and 1937, respectively.

14. (Exceptions 4, 14, 24 and 25.) The Express Agency contends that it does not issue to joint and merchant agents any rules, regulations, instructions or orders going to the methods and details of those agents' express service. However, the discussion on pages 11-15 of the Examiner's original report and pages 19-20 of his report on rehearing shows beyond question that (1) the Express Agency issues written rules and regulations to its joint and merchant agents, (2) these rules and regulations are subject to change from time to time by the Express Agency, without the consent of the agent, (3) some of the rules and regulations unquestionably go to the methods and details of the agents' express service, (4) the rules and regula-

1327 tions are applicable to joint and merchant agents except when those agents are expressly excepted or the rule or regulation has no relationship to their duties and (5) through its route agents, the Express Agency gives to joint and merchant agents verbal instructions and orders as to the "minutiae" or "details" of the express work. The Board is fully in agreement with this discussion and the findings made therein.

15. (Exceptions 15, 22.) These exceptions relate to a finding of the Examiner on pages 21-22 of the report on rehearing. In its brief on rehearing, the Express Agency had stated, as its reason for retaining authority to control the methods and details of joint and merchant agents' service, that it is responsible for loss or damage to shipments or for injury to persons resulting from negligent performance of work regardless of whether such loss, damage or injury is caused by an employee or an independent contractor. The Examiner's finding as to this is that the Express Agency's statement of its reason for retaining authority to control methods and details shows that it does in fact have such authority, and that the compelling nature of the reasons demonstrates the impracticability of operating through independent contractors. The Express Agency's objection to this is merely an assertion that, although the Express Agency could protect itself more completely from claims for loss or damage by retaining control over methods and details, it does not in fact do so. This is a mere reiteration of the Express Agency's position in this proceeding, without any reasoning in support thereof or in refutation of the Examiner's finding.

16. (Exceptions 19 and 21.) The Express Agency relies upon the case of *Simonton* v. *Morton*, 275 Pa. 562, 199 Atl. 732 (1923). This case is fully discussed in the Examiner's original report (pp. 28, 29) and is there distinguished on several grounds from the case of the joint and

merchant agents. In its exceptions, the Express Agency compares the case of Simonton *vs.* Morton with the case of the joint and merchant agents in the following
1328 respects:

> (1) "The Express Agency does not furnish the premises upon which the work is carried on nor pay the telephone, electric light or water bills, whereas in the case of Simonton *vs.* Morton, the premises used for the storage of supplies for the conduct of the work were paid for by Morton, the principal party."

On the contrary, it is established that the Express Agency does secure the use of the railroad company's premises, and that only an estimated 1082 merchant agents furnish premises on which the express service is performed. Furthermore, Morton did not furnish the place of work, but only the premises for storage of supplies.

> (2) "In our case, the Express Agency furnishes the joint and merchant agents with scales, necessary forms to conduct the business, and sometimes, when necessary, a hand truck. In the case of Simonton *vs.* Morton, the principal party, Morton was required to furnish all materials for the work to be done."

As conceded by the Express Agency, it does furnish the joint and merchant agents with equipment and supplies. The record does not show, nor does the Express Agency contend, that any materials or supplies are furnished by the joint or merchant agents.

> (3) "In both our case and that of Simonton *vs.* Morton," the individuals engaged "agreed to furnish the necessary labor to carry on the work of the principal party."

As pointed out on pages 28 and 29 of the Examiner's original report, there is in this respect a vital difference between the two situations. In Simonton *vs.* Morton, the parties knew that the work could not be done without the assistance of other workmen. On the other hand, in the case of the joint and merchant agents, the work is known to be such as not to require the full time of even one individual, so that the hiring of assistants is not contemplated except in unusual situations. Futhermore, under Rule 820 of the Express Agency's rules and regulations, 1329 joint and merchant agents are prohibited from delegating any part of their work without authorization from a superior officer. Under those circumstances, the fact that a few joint or merchant agents might, in rare and unusual situations, have their friends, relatives, or other persons assist them with their express work is very little, if any, indication of independence.

16. (Exceptions 22 and 23.) These exceptions raise a question as to whether certain items are to be deducted from the commissions of joint and merchant agents in computing their compensation. Exception 22 is to the effect that in the case of merchant agents, who furnish the use of premises for the performance of express work, there must be deducted from their commissions the value of the use of the premises. Exception 23 is to the effect that deduction from commissions must be made by reason of persons in the agent's employ who happen to do some work for him in connection with the express work. The question involved in this proceeding is whether joint agents and merchant agents, when performing service for the Express Agency, are subject to such control by that Agency that their relationship to it is that of an "employee." The question of which items are, and which are not, to be included in their compensation will not arise until after it has been determined that they are "employees" of the Express Agency. Consequently, these exceptions of the Express Agency deal with a question not before the Board for determination in this proceeding. For the purpose of this proceeding, it is sufficient to point out that the furnish-

ing of some equipment or facility, or the utilization, for hire, of the services of other persons, is not necessarily inconsistent with the status of "employee." See *Pittsburg V. J. Co.* v. *Gallagher*, 32 F. (2d) 436, and *Waldron* v. *Garland Pocahontas Coal Company*, 89 W. Va. 426, 109 S. E. 729 (1921), cited in the Examiner's report on rehearing, pages 36 and 27, respectively. Any employee is likely to contribute some equipment or supplies for use in
1330 performing his service: for example, in the railroad
industry, conductors furnish watches, and switchmen furnish watches and lanterns. Whether the contributions of a particular individual are indicative of an independent status depends on the nature and extent of such contributions, and the circumstances under which they are furnished.

On the basis of the entire record in this proceeding, the Board's decision is as follows:

(1) The Board approves and adopts the findings of fact made by the Examiner in his report of March 19, 1938, as supplemented by the findings of fact in his report on the rehearing of August 5, 1938;

(2) The Board approves and adopts the conclusions of law reached by the Examiner in his report of March 19, 1938, as supplemented by the conclusions of law in his report on the rehearing of August 5, 1938;

(3) The Board adopts as its opinion in the disposition of this matter the Examiner's report of March 19, 1938, as supplemented by his report on the rehearing of August 5, 1938, and supplemental further by the foregoing discussion of the Express Agency's exceptions to the Examiner's report on rehearing;

(4) The Board decides the questions stated in its order of October 28, 19[illegible] as recommended by the Examiner in his report of March 19, 1938 supplemented by his report on the rehearing of August 5, 1938; and the Board hereby

formulates the following rulings with respect to those questions:

(a) The individuals described as "joint agents" or as "merchants agents," whether paid on a commission basis or a "fixed allowance" basis, are, while rendering service to the Express Agency, "in the service of" the Express Agency, within the meaning of Section 1 (c) of the Railroad Retirement Acts of 1935 and 1937; such individuals are therefore employees under the Railroad Retirement Act of 1937; and they
1331 are also employees under the Railroad Retirement Act of 1935 if they were on or after August 29, 1935, in the service of or in an employment relation to the Express Agency, or were otherwise employees as defined in that Act;

(b) The time devoted by such individuals to the performance of their duties for the Express Agency is creditable as service toward annuities under the Railroad Retirement Acts of 1935 and 1937, subject to provisions of said Acts pertaining to the creditability of service toward annuities;

(c) This decision does not apply to cases in which a company or other entity not an individual is designated as agent of the Express Agency; in such cases, an investigation will be made to determine which individuals, if any, are rendering service subject to the continuing authority of the Express Agency to supervise and direct the manner of rendition thereof. Nor does this decision determine whether a joint or merchant agent who also performs pickup and delivery service for the Express Agency is, with respect to such pick up and delivery service, an "employee" within the meaning of the Act of 1935 or 1937; the status of such agents with respect to such pick up and delivery service will be determined on the basis of the facts in each particular case.

Decided by B. O. 39-502, adopted August 1, 1939.

1368

Form No. G-21

This form is to be used only by the Secretary of the Board or as otherwise specifically directed by the Board.

Transcript No. Special   Page 1 of 2 Pages

Date Transcript Released

United States of America

RAILROAD RETIREMENT BOARD

Transcript of Board Orders

I certify that the following is a true and correct transcript of board order(s) numbered 48-229, transcribed from the record of proceedings of June 23, 1948.

Mary B. Linkins,
Secretary of the Board.

B. O. 48-229

Authorizing hearing to determine whether joint agents, merchant agents, branch agents and certain other individuals performing express work should be classified as employees under Railroad Unemployment Insurance Act, and whether Railway Express Agency, Incorporated, is entitled to refund of contributions based on compensation of such individuals. Reopening jurisdictional Docket No. 2, and authorizing hearing to determine whether joint agents, merchant agents, branch agents and certain other individuals performing express work should be classified as employees under Railroad Retirement Acts.

Whereas, it is necessary in the administration of the Railroad Unemployment Insurance Act to determine whether joint agents, merchant agents, branch agents and certain other individuals performing express work should be classified as employees, under the Act, and whether the Railway Express Agency, Incorporated, is entitled to a refund of contributions based on the compensation of such individuals; and

Whereas, it is necessary in the administration of the Railroad Retirement Acts of 1935 and 1937 to determine whether joint agents, merchant agents, branch agents and certain other individuals performing express work should be classified as employees under the Acts, and, for that purpose, to reopen Jurisdictional Docket No. 2;

The Board, pursuant to its authority under Section 5(b), (c), and (e) through (i), and Section 12(a) through (c), (l) and (m), of the Railroad Unemployment Insurance Act, and Section 10(b)4 of the Railroad Retirement Act of 1937, orders and directs as follows:

(1) Omer M. Funk is hereby authorized and directed to hold a hearing, and to act as Examiner for the Board, at such time, date and place as he may arrange to meet his convenience and the convenience of interested parties.

(2) Notice of the time and place of such hearing and of the right to participate therein shall be given to the Railway Express Agency, Incorporated, the Order of Railroad Telegraphers; the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; the Railway Labor Executives' Association; the Commissioner of Internal Revenue; the Social Security Administration of the Federal Security Agency; the
1369 National Mediation Board; The National Labor Relations Board; the Interstate Commerce Commission; the Wage and Hour and Public Contracts Division of the Department of Labor; and any other parties who may be found to be properly interested in the proceedings; and each of such parties shall be afforded an opportunity to present evidence and to make arguments before the Examiner.

(3) The hearing shall be held upon the following questions:

(a) Are joint agents, merchant agents, branch agents, and certain other individuals performing express work, to be classified as employees under the Railroad Unemployment Insurance Act, and is the Railway Express Agency, Incorporated, entitled to a refund of contributions, under the Act, based on the compensation of such individuals?

(b) Are joint agents, merchant agents, branch agents, and certain other individuals performing express work, to be classified as employees under the Railroad Retirement Acts of 1935 and 1937?

(4) In accordance with the provisions of Section 319.96 of the Regulations under the Railroad Unemployment Insurance Act, and Sections 250.7 through 250.15 of the Regulations under the Railroad Retirement Act of 1937, the Examiner is hereby authorized, in the preparation for, and in the conduct of, said hearing, to require and compel the attendance of witnesses and the production of records and documents, administer oaths, take testimony, and make necessary investigations. A record shall be kept of all evidence presented, orally or in writing, at said hearing. The evidence presented orally shall be under oath. The examiner may require that copies of all exhibits admitted in evidence at the hearing be furnished by the party offering the same to all other parties participating or entering an appearance in the proceedings.

(5) The Director of Supply and Service is hereby authorized and directed, upon request by the Examiner, to make any necessary arrangements to secure space for the hearing.

(6) The Director of Personnel is hereby authorized and directed, upon request by the Examiner, to make the necessary arrangements to secure stenographic services for the reporting of the hearing and for the procurement of copies of the transcript of record of the hearing.

(7) In accordance with Section 319.96 of the Regulations under the Railroad Unemployment Insurance Act, and Section 250.15 of the Regulations under the Railroad Retirement Act of 1937, the Examiner shall, upon conclusion of the taking of evidence and the presentation of such arguments as are made to him, formulate findings of fact, conclusions of law, recommendations and reasons therefor, all of which, together with the record of the proceedings, shall be transmitted to the Board for consideration and decision.

1370 13 F. R. 3973

July 14, 1948

RAILROAD RETIREMENT BOARD.

(20 CFR, Ch. II.)

(R. R. B. Jurisdictional Docket No. 2-2A)

Status of Joint Agents, Merchant Agents, Branch Agents and Certain Other Individuals Performing Express Work, and Demand of Railway Express Agency, Inc., for Refund of Contributions Based on Compensation of Such Individuals.

NOTICE OF HEARING.

For the purpose of determining whether joint agents, merchant agents, branch agents and certain other individuals performing express work should be classified as employees under the Railroad Retirement Acts of 1935 and 1937 (45 U. S. C. 215-228s) and the Railroad Unemployment Insurance Act (45 U. S. C. 351-367), and whether the Railway Express Agency, Incorporated, is entitled to a refund of contributions under the Railroad Unemployment Insurance Act, based on the compensation of such individuals, a hearing will be held under section 10(b)4 of the Railroad Retirement Act of 1937 and section 5(c) of the Railroad Unemployment Insurance Act, as amended. The hearing will be held on Tuseday, August 10, 1948, at 10:00 a.m., Central Daylight Saving Time, in Room No. 1230, 844 North Rush Street, Chicago, Illinois, before Mr. Omer M. Funk, as the Examiner appointed by the Board.[1]

All parties properly interested may participate in the hearing and will be accorded an opportunity to present evidence and to make arguments before the examiner.

The hearing will be held upon the following questions:

(a) Are joint agents, merchant agents, branch agents, and certain other individuals performing express work, to be classified as employees under the Railroad Unemployment Insurance Act, and is the Railway Express Agency, Incorporated, entitled to a refund of contributions, under the act, based on the compensation of such individuals?

(b) Are joint agents, merchant agents, branch agents, and certain other individuals performing express work, to be classified as employees under the Railroad Retirement Acts of 1935 and 1937?

The hearing will be held in accordance with the provisions of §319.96 of the regulations under the Railroad Unemployment Insurance Act (13 F. R. 3115-3116) and §§250.7 through 250.15 of the regulations under the Railroad Retirement Act of 1937 (4 F. R. 1499-1501).

Omer M. Funk,
Examiner.

July 9, 1948.

(F. R. Doc. 48-6286; Filed July 13, 1948; 9:30 a.m.)

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[1] Board Order 48-229 June 23, 1948.

1371 Hearing held Tuesday, Wednesday and Thursday, August 10 to 12, 1948, in Room 1230 of the Railroad Retirement Board, 844 Rush Street, Chicago, Illinois, by Examiner Omer M. Funk, in pursuance of authority granted by Board Order No. 48-229.

* * * * *

1381 Examiner Funk: Mr. Long, would you like to make an opening statement on behalf of the Railway Express Agency?

Mr. Long: Yes, I would, Mr. Examiner.

* * * * *

In September 1937, the question of the status of joint agents and merchant agents under the Railroad Retirement Acts became important when, in response to a letter from the Railroad Retirement Board, Railway Express suggested that it should be relieved of furnishing the information with respect to such agents called for by the Railroad Retirement Board Form AA-2. After hearings before Lester P. Schoene, sitting as Examiner, the Railroad Retirement Board ruled that the joint railroad-express agents and the merchant agents were employees of Railway Express within the meaning of the Railroad Retirement Act.

Thereafter, Railway Express paid, under protest, the excise and income taxes under the Carriers Taxing Act of 1937 with respect to the joint railroad-express agents, the merchant and branch agents, and the helpers, assistants and employees of such agents. Thereafter, within the time permitted by law, Railway Express filed with the Treasury Department claims for refund of such taxes paid, which claims were denied. Thereafter, suit was brought against the Collector of Internal Revenue, to whom such taxes were paid, which suit is still pending in the United States District Court for the Southern District of New York. Fol-

1382 lowing the decision of the Railroad Retirement Board holding the joint railroad-express agents and merchant agents employees of Railway Express within the meaning of the Railroad Retirement Act, Railway Express paid, under protest to the Railroad Retirement Board contributions under the Railroad Unemployment Insurance Act with respect to the joint railroad-express agents, merchant agents and branch agents, and the helpers, assistants and employees of such agents. Thereafter, claims were duly made for refund of such contributions, and as yet, none of such claims have been paid or declined.

Railway Express has submitted to the Attorney General of the United States an offer of compromise in said suit pending in the United States District Court of New York, If accepted, Railway Express will have waived its claim for refund of taxes paid with respect to the joint agents, their helpers, assistants and employees, and refund of taxes paid will be made or approved with respect to merchant agents and branch agents and the helpers, assistants and employees of such agents.

In consonance with that offer, but solely for the purpose of this proceeding, Railway Express hereby waives any claim it may have for refund of contributions with respect to the joint railroad-express agents and all full time employees of railroads which handle express and such others as are referred to in our claim for refund, except the merchant agents and branch agents and their helpers, assistants and employees; and Railway Express concedes that for the purposes of this proceeding joint railroad-express agents and all full time employees of railroads who handle express are employees of Railway Express within the meaning of the Railroad Retirement Act and the Acts related thereto, particularly the Railroad Unemployment Insurance Act.

* * * * *

1398 MR. LOWELL S. HORTON, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows.

Direct Examination by Mr. Long.

Q. Will you give your full name and address to the stenographer.

A. Lowell S. Horton, Nauvoo, Illinois.

Q. What is the population of Nauvoo?

A. About 1,100.

Q. What business do you conduct in Nauvoo?

A. A service station, home appliances, coal business, and I have Hancock County served with bottled gas.

Q. I understand you are the Mayor of Nauvoo. Is that correct?

A. That is correct.

Q. Mr. Horton, when did you become agent for Railway Express Agency in Nauvoo?

A. I think it was December 1944.

Q. Now, at that time, did you sign an Application for Employment, Form 100, of Railway Express Agency?

A. Let me see it.

(The form in question was handed to Mr. Horton by Mr. Long.)

A. Yes, sir, that's my signature.

Mr. Long: I offer that in evidence.

(Railway Express Agency Form No. 100, Application for Employment, also containing Application for Fidelity Bond, dated January 18, 1944, signed by Lowell S. Horton, was received in evidence and marked EXHIBIT NO. IX.)

Q. Now, Mr. Horton, I notice that Exhibit No. IX, which is Application for Employment, Form No. 100, is signed "Horton's Standard Service, by Lowell S. Horton." Did you have a partner in the business known as Horton's Standard Service?

A. I do.

Q. And do you and your partner conduct all of the business that you have described, including the express business?

1399 A. Yes, sir.

Q. And are all the funds which are received from that business, including the funds received in the transaction of express business, placed together and thereafter divided between you and your partner?

A. That's right.

Q. Now, where in your place of business is the express work conducted?

A. Wherever it happens to be handy. We have one corner that we have our file, our little cupboard, and scales.

Q. Did Railway Express ever advise you as to where your business could be conducted? That is, the business of Railway Express.

A. No—and they'd better not.

Q. Now, what, if anything, did Railway Express furnish you for the conduct of the express business at Nauvoo?

A. The tariff books, those address cards to tie on to packages, two sets of scales, I believe, a lot of other stuff I thought they couldn't use any place else.

Q. Did they furnish you with forms such as waybills, etc.?

A. I think that is right.

Examiner Funk: What is this other stuff you say you received?

Witness: Wrapping paper, maybe some gummed paper to wrap packages with, etc.

Q. Do you perform a pickup and delivery service in the express business?

A. Yes, we do.

Q. And who furnishes the truck for that work?

A. We do.

Q. Is there any sign on that truck?

A. Yes, sir.

Q. And what is that sign?

A. Horton's Standard Service.

Q. Is there any sign indicating Railway Express on that truck?

A. No, sir.

Q. Who pays for the gasoline in the operation of that vehicle?

A. We do.

1400 Q. Who pays for insurance that is carried with respect to that vehicle?

A. We do.

Q. And who drives that vehicle?

A. My partner, myself, one of the fellows that works for us.

Q. Who pays that chap that works for you?

A. We do.

Q. Does Railway Express have anything to do with that?

A. No.

Q. Now, has Railway Express furnished you a sign to place upon your building where your place of business is?

A. I believe they did.

Q. Did anybody tell you where that sign should be placed?

A. No.—I think it is under the counter right now.

Q. How many employees have you working in your various businesses at Nauvoo?

A. At present, we have three besides my partner and myself, and another part time man.

Q. And who determines their wages?

A. They try to; so do we.

Q. Does Railway Express Agency have anything to do with that?

A. No, sir.

Q. Do any of these employees of yours do any work in connection with express?

A. Oh, if somebody brings a case of eggs in or something, they send it out, bill it—Not particularly, no.

Q. Do they all pitch in and help, no matter what the business is?

A. That's right.

Q. Now, do you pay Social Security taxes on any of these employees?

A. Yes, sir.

Q. And where do you pay that?

A. Office at Springfield—the Alderman's office, I believe it is.

Q. And is that tax paid upon the entire salary or
1401 wage that you pay these employees?

A. It is.

Q. Who in your place of business makes out the various reports to Railway Express?

A. Mrs. Harsh, our lady who takes care of the books.

Q. Is she an employee of yours?

A. Yes, sir.

Q. Did you advise Railway Express at any time that Mrs. Harsh was to make out those reports?

A. No, sir.

Q. Did you consult with Railway Express at any time as to who should make out any reports?

A. No.

Q. In fact, does Railway Express Agency know who makes out those reports?

A. No, I think not, unless she would sign her name under mine.

Q. Do you remember the circumstances under which you became agent?

A. Yes, sir.

Q. Will you describe those, please?

A. We were about to lose the express agency in Nauvoo, mainly because we are not on a railroad, and the express service had been unsatisfactory to the Express Company, and they petitioned the Commerce Commission to discontinue the agency in Nauvoo. Myself, with a group of citizens in town—

Q. Let me interrupt just one moment there. At this particular time, you were not representing the Express Agency as agent. Is that right?

A. No. It was temporarily discontinued. We were notified of a hearing in Springfield, by the Commerce Commission, I believe. A group of citizens and myself went up to Springfield to have it continued in Nauvoo, and we were successful. We had located a person who had promised to take the agency at Nauvoo, in the hardware business—Mr. Lutz. His hardware store was next to the post office, and before it had been discontinued, the person that
brought the mail in brought the express in, so we
1402 thought that would make a nice handy combination
to have the hardware man handle express. It would be unloaded right there at the same place. In the meantime, he was called into the service, and his wife didn't feel that she could handle the business. After trying to locate another person or two to handle it, without success, we took it at the station at our place of business. We worked hard to get it, we didn't want to have no place to handle it, so we have handled it since then.

Q. Now, who has a key to your place of business?

A. Myself and my partner.

Q. Does any representative of Railway Express Agency other than yourself have a key to the place of business where you operate?

A. No.

Q. Have any representatives of the Express Agency ever called at your place of business?

A. Mr. McAdam. I think he is route agent or supervisor.

Q. Is he here today?

A. Yes. He is down at the end of the table. When we were having the hearings at Springfield, there was a Mr. Goodrich, I believe, that called there a couple times.

Q. When did Mr. McAdam last call at your place of business?

A. I don't pay any attention. He probably comes once a month or two months or maybe three months—whenever he is around there.

Q. And when he calls, what does he say to you and what do you say to him?

A. Very little. We pass the time of day, and he checks the express records, I guess, and goes about his business. I do the same thing.

Q. Does he ever tell you as to the manner in which you should conduct the express business there?

A. No—and he doesn't want to start.

Q. What, if anything, would you do in the event Mr. McAdam or any other representative of the Express Agency told you how to run your express work?

1403 A. I'd boot him out, I expect.

Q. Now, do you sell any tickets there for any bus company?

A. Yes, sir, we do.

Q. And what is the arrangement you have with respect to that?

A. Well, we happen to have a bus depot in Nauvoo, our place is handy, so we sell tickets.

Q. And how are you paid for performing that service?

A. I think it's 10%—not very much.

Q. Is anything deducted from your income from selling tickets for Social Security?

A. Not that I know of.

Q. Do you own the premises where the express business is carried on at Nauvoo?

A. No, we do not.

Q. Do you rent the premises?

A. Yes, sir.

Q. And who pays the rent?

A. We pay part of it to Standard Oil, on a gallon basis. Then there has been an addition built on the station, that we pay the owner direct. Mrs. Jackson at Warsaw owns the property, and on the addition to the station we pay her direct.

Q. Is it my understanding that the oil company has leased these premises from the owner.

A. That is right.

Examiner Funk: And you have subleased it?

Witness: Yes.

Q. Does Railway Express Agency have anything to do with the payment of rent on those premises?

A. No. sir.

Q. When this lady who takes care of making out the reports of your express business takes time off for vacation or illness, who takes care of making out those reports?

1404 A. Oh, my partner and myself.

Q. And do you consult the Express Agency on any change such as that?

A. No.

Q. Do you notify the Express Agency as to any change such as that?

A. No.

Q. Is all of your business, including express business, handled under the name of Horton's Standard Service?

A. That is right. It is.

Q. Now, how much money have you invested in your business? That is rather a personal question, but it is rather important here. Or what is your business rating? Perhaps I should put it that way.

A. Our net worth the first of January was $52,000.

Q. How many shipments would you say you handle a month, or a day?

A. An estimate? I couldn't tell. They vary from 2 to 100.

Q. When you say 2 to 100, do you mean per month or per day?

A. It could be either.

Examiner Funk: Do you ever have 100 per day?

Witness: We have St. Mary's Academy, boarding school for girls, and when the school is out, we may handle 100 trunks in one day. That would be about once a year or twice a year, when they come back to school and when school is out, and at Christmas time.

Q. Do you know approximately what your average earnings in the express business amount to?

A. I couldn't answer that.

Q. What is the basis upon which you are paid for handling express?

A. I believe it is 10%, and 10¢ a pickup and delivery. I believe that's right.

Q. Nauvoo is not served by a railroad directly, I understand.

A. No, sir.

Q. It is served by and over the route of Railway Express?

A. Yes, sir.

1405 Q. Do you have anything whatever to do with the driver of that truck route?

A. No, sir.

Q. You don't meet any trains?

A. No.

Q. Now, has there been any change with respect to the manner in which the express business has been handled at your station since you took it over and now?

A. No.

Q. Do you have a telephone in your place of business?

A. We do.

Q. Under what name is the telephone listed?

A. Horton's Standard Service.

Q. Is Railway Express Agency listed at all in the telephone directory at Nauvoo?

A. No, sir.

Q. Who pays for the telephone?

A. We do.

Q. Have you ever read the book entitled "General Rules and Instructions, Railway Express Agency?"

A. No, I don't think I have ever.

Examiner Funk: Do you have a copy of that book?

Witness: Oh, we may have. I don't know.

Mr. Long: I might say that reference is made to Exhibit 8 offered in evidence at the hearing held—

Examiner Funk: Is that the first hearing?

Mr. Long: Yes. Held at the first hearing. Will that be sufficient?

Examiner Funk: Yes.

Q. I direct your attention to rule 920 in Exhibit 8 just referred to, reading: "The telephone is furnished for the Company's business; employees should not be permitted to use it for personal matters except in case of emergency," and ask you if that applies to your place of
1406 business.

A. That means the Express Company's business?

Q. Yes.

A. We don't have any Express Company's business. That's our business.

Q. That is your own telephone?

A. Yes.

Q. Do you receive express calls over that telephone?

A. If somebody wants us to pick up a package, sure.

Examiner Funk: It is used for express purposes?

Witness: Sure. If somebody wants an express package picked up, they call us.

Q. Do the people in Nauvoo know, generally, you represent the Express Agency as its agent?

A. Yes, sir.

Q. And when they want to call for express service, they call Horton's Service. Is that right?

A. Yes, sir. If we are closed, they call the house, down home.

Q. Well, now, what time of day does your business open?

A. Seven in the morning.

Q. And what time does it close?

A. Whenever we get tired—generally about six o'clock.

Q. And you receive express shipments during those hours?

A. Yes, sir.

Q. Has anybody from the Express Agency ever told you as to the time of day you must open your business or the time of day you must close it?

A. Not yet.

Q. And if they do, what will you do?

A. Well, I don't believe I'd pay too much attention to it.

Q. Now, is your place of business ever open Sundays?

A. We are open from nine in the morning until one.

Q. And would you accept a shipment for transportation by express during those hours, on Sunday?

1407 A. Yes—or after hours. It doesn't make any difference to us.

Q. Or if anybody in your town there wanted a shipment that was held by you, say, after six o'clock at night, would you open up your place of business and get it for them?

A. Surely.

Q. Well, now, has the Express Agency ever advised you or informed you as to those practices?

A. No.

Q. Have they had anything whatever to do with respect to those practices?

A. No. We just do it for good will in the community.

Q. What is the name of your partner?

A. Raymond F. Kelly.

Q. Have you ever been instructed by Railway Express Agency that Mr. Kelly is not to delegate any of his work with respect to the express agency to any other individual?

A. No.

Q. Do any of the individuals working on express at Nauvoo have an express badge?

A. No.

Q. Do any of them wear uniforms?

A. No.

Q. Do you consider that Railway Express Agency has anything whatever to do with respect to the personal conduct of yourself in connection with the performance of express work at Nauvoo?

A. No.

Q. Or any of your employees?

A. No.

Q. Has any representative of Railway Express Agency ever spoken to you relative to personal conduct of yourself or any of your employees?

A. No.

Q. I direct your attention to Application for Fidelity Bond, a part of Form 100, which you signed, and
1408 particularly to Paragraph A thereof, reading: "The Subscriber agrees that he will throughout his employment by the Company faithfully perform all of his duties,

including the keeping of true and correct accounts of the business of the Company conducted by him or in his charge, all as required by the rules and regulations of the Company; and he understands and agrees that he is to be held personally responsible for the repayment to the Company of any and all losses which it may sustain through his failure to do so." Now, was it your understanding that that particular clause—that is, Clause A—applied to the specifications of the business which were to be handled by you?

A. Well, naturally, you are supposed to turn the money over that you collect for express.

Q. Well, did you understand that also was to apply to the personal conduct of yourself and your employees?

A. No.

Q. Or as to the manner in which you handled the business?

A. No.

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1409 Q. Mr. Horton, do you ever do any advertising of your business or businesses in Nauvoo?

A. Yes, sir.

Q. And do you ever include Railway Express business in that advertising?

A. Only in our direct mail bulletins that I get out.

1410 Q. And who pays for that advertising?

A. Horton's Standard Service.

Q. Does Railway Express Agency make any contribution whatever toward that advertising?

A. No, sir.

Examiner Funk: Pardon me. Mr. Horton, do you have any copy of those direct mail bulletins?

Witness: I could send you one. I don't know if I could find any one that said anything about Railway Express.

Examiner Funk: I mean with regard to your testimony that you sometimes refer to in the mail bulletin.

Witness: I have. I don't suppose I have for a couple of years.

Examiner Funk: Mr. Long, will you secure one of those, please?

Mr. Long: Yes, I shall.

Q. Now, do you belong to any labor union, Mr. Horton?

A. No, sir.

Q. Do any of your employees belong to a labor union?

A. No, sir.

Mr. Long: That is all, as far as the Express Agency is concerned.

Examiner Funk: Mr. Hassenauer, do you have any cross-examination?

Mr. Hassenauer: Thank you, Mr. Examiner.

Cross-Examination by Mr. Hassenauer.

Q. Mr. Horton, you testified that you have the agency for some bottled gas unit in Hancock County. Is that correct?

A. That is right.

Q. Do you have a contract with the manufacturer of that gas with respect to the handling and distribution in the county?

A. We are county distributors for it, yes, sir.

1411 Q. Yes. Well, does the manufacturer of that gas give you any instructions as to the method or the manner in which you are to conduct the business as a distributor?

A. No, sir. We use good business practices in everything.

Q. You also operate a gasoline filling station at Nauvoo, Illinois?

A. That is right.

Q. And you have a contract with the Standard Oil Company?

A. As to commissions, yes, sir.

Q. Does the Standard Oil Company dictate to you the method or the manner in which you are to conduct the business of Standard Oil on your premises?

A. No, sir. I believe that is against the law for them to do that.

Q. And that applies to employees of yours, and your partner?

A. Yes, sir.

Q. Where are these bus tickets sold that you mentioned in your direct examination? Are they sold from the gasoline filling station?

A. Right at the station.

Q. And are those tickets sold by any of your employees?

A. Yes, sir.

Q. Whoever might be available at the time when that ticket is requested?

A. That is right.

Q. Are these tickets sold for an interstate or intrastate bus company?

A. I believe they operate interstate.

Q. What is the nearest town to Nauvoo of any particular size?

A. Fort Madison, Iowa.

Q. Do you know whether this bus company operates bus service over there for which a ticket can be purchased at your station?

A. We sell tickets to Fort Madison, yes, sir.

Q. What happens to the proceeds that you receive from the bus company for the sale of those tickets? What do you do with that money?

A. Put it in the cash register.

Q. And does that go into the common fund and then is divided subsequently between you and your part-
1412 ner?

A. That is right.

Examiner Funk: You make a report to the bus company, don't you?

Witness: Yes. They have a man that comes through, maybe once a month or two months.

Examiner Funk: Is it on a commission basis?

Witness: Yes, sir.

Q. Then it is just the commissions that go into the register?

A. No. We put it all in and give them a check.

Q. You keep the net after you deduct your commissions, which would be the net from the bus revenue, and you transmit the other balance to the bus company?

A. That is right. We just give them a check for the tickets that have been sold.

Q. Mr. Horton, have any of your employees ever been injured while handling express business?

A. Not that I know of. We have had a few of them. One fellow cut his hand. I don't think it was handling express.

Q. Did he file a claim with you that he was engaged in handling express at the time that he sustained that injury?

A. Oh, no. We have compensation on our employees. It doesn't make any difference what they are doing. He might be handling coal or bottled gas or express or any other work that they'd be doing around the station.

Q. So that if one of your employees was injured without any negligence on his part while handling express, would you regard that as a claim of your company, or would you regard the Express Company liable to pay that claim?

A. Our company.

Q. You would pay the claim?

A. That's right. Sure.

1413 Q. In the event that the route agent called at your place of business in order to check certain records, and you were not available, would he check those records with Mrs. Harsh?

A. Yes, if he wanted to.

Q. Has he ever done that?

A. No, sir.

Q. Has he ever left any instructions with Mrs. Harsh to be transmitted to you as to how the business could be handled further or to increase your profit?

A. No, sir. We really don't do it for a profit.

Q. If you don't do it for a profit, then why do you handle Railway Express business? Is it done for the convenience of the people in your vicinity?

A. That is right. Community spirit.

Q. You are the Mayor of the town, I recall you testified. Is that correct?

A. That is right.

Q. Has anyone ever filed any claims with you or your partner or any of your employees with regard to damaged express shipments?

A. Oh, once in a while you get a shipment that is damaged. There are certain forms, I believe, that they fill out.

Q. Have you ever filled out any of those forms where report of a damaged shipment has been made?

A. No. I couldn't do it. Mrs. Harsh takes care of that.

Mr. Hassenauer: Thank you, Mr. Horton.

Examiner Funk: Do the Clerks have any cross-examination?

Mr. Morgan: Yes.

By Mr. Morgan:

A. Those shipments, Mr. Horton.—You talked about the girls moving from one or two of the colleges through your town there, and you said that sometimes it may be 100 shipments a day, and other times it might only be 2 shipments a day. Let us take the period of 2 shipments

1414 a day for illustration, and as an accommodation to your labor force there you accumulate those 2 shipments a day. Would you be privilegel to hold them on hand and send them out every other week, for example?

A. The truck comes in every day—the express truck.

Q. What time of day, approximately?

A. Oh, about one-thirty he drives to town, and leaves about two-thirty.

Q. And if you get those 2 shipments in the morning, for example, your force would make effort to get them out on that particular truck that afternoon at one-thirty?

A. We try to, yes sir.

Q. Why do you do that?

A. As a matter of good business; and if you brought a case of eggs in in the morning, I'm sure if you were a customer you'd want them to go out that afternoon.

Q. I mean, your contract or understanding with the Express Agency direct—they want you to handle that business promptly. Isn't that your understanding of your obligation with the Express Agency?

A. The customer does.

Q. How about your employer, the Express Company?

A. It is not particular with them. They have never told us to get them out today or tomorrow.

Mr. Long: We will concede that the Express Agency expects those shipments to be handled in an expeditious manner. That is one of the specifications of the work.

Examiner Funk: Where are those specifications set forth, Mr. Long?

Mr. Long: Well, they are not set forth in any writing outside of our General Rules and Instructions. They do contain specifications as to the prompt handling of express business. The word "express" connotes promptness, and when we hire an agent as an express agent, whether he is a merchant agent, a salaried agent or what have you, we expect that he will act as an express agent.

1415 Q. As a matter of business, then, and also your understanding with the Express Agency, you try to get that out on the one-thirty truck, if that is possible?

A. That is right.

Q. You don't use your own discretion as to when it moves?

A. Oh, I guess you'd say it was our own discretion.

Q. Now, who handles the issuance of financial paper at your office—writes the express money orders?

A. We don't handle them. We never have occasion to handle express money orders.

Q. There are 1,100 people in the town?

A. That is right.

Q. When you took over in December 1944, you said, you then used an Express Agency sign that express business would be conducted at your place of business?

A. I think we had it up for a while.

Q. There being 1,100 people there, you didn't believe you needed to keep that on your trucks?

A. We never did have it on our trucks.

Q. Well, on the building?

A. No. Just as general information.

Q. You do receipt for packages that are brought in, or your driver will receipt the shipper for packages that he receives to be brought in?

A. They have little receipts he signs as receipt of shipment.

Q. What is the form of receipt there? Whose receipted form is that?

A. An Express form, generally. If I happen to be there, I just make it out on one of our station receipt books.

Q. Do you happen to know the particular form number of that receipt?

A. I do not.

Q. It is not a Horton receipt?

A. Not always. Once in a while it can be, if I don't
happen to have the receipt. Mrs. Harsh generally makes
the receipts up as shipments come in. I just make
1416 it out on a Horton's Standard Service pad and they
sign that they have received a shipment and go about
their business.

Q. You also issue Express Agency receipts?

A. Yes, sir.

Examiner Funk: This Mrs. Harsh is the lady you testified is your bookkeeper?

Witness: That is right.

Q. You collect charges too?

A. Yes, sir.

Q. Both for collect and prepaid?

A. Yes, that is right.

Mr. Morgan: That's all.

Mr. Crawford: I have a few questions I'd like to ask.

Examiner Funk: Mr. Crawford.

By Mr. Crawford:

Q. Mr. Horton, prior to your taking over this express work there, had you had any express experience as an expressman?

A. No.

Q. As I understand now, you didn't hold yourself out to the Railway Express Agency as being an experienced expressman. Now, if I recall your testimony, you said that you took over the agency there by reason of civic interest or public spiritedness.

A. That is right.

Q. Now, when you took that over, you also had in mind, did you not, not only the public but also to render to the public a standard express service wich the Railway Express Agency is noted for in its reputation in that particular field? You did intend to maintain that standard of service, did you not?

A. Oh, yes, sure.

* * * * *

1417 Q. Mr. Horton, now, some of the duties there. You receive and deliver express shipments, do you not

A. Yes, sir.

Q. And you collect transportation charges?

A. Yes, sir.

Q. And you make necessary remittances and reports to the Express Agency from time to time?

A. That is right.

Q. Now, keeping in mind that you stated you had no previous express experience, it was necessary, was it not that you receive some instructions and education on the handling of express before you took over this agency?

Mr. Long: We will concede that he was informed as to the handling of express. That is part of the specifications of a job. When a contractor builds a house, the owner of it, or the person hiring the contractor, tells him how he wants the house built. That is what we did with this man

Q. Well, they also told you what work was to be done and how it was to be done, didn't they? The methods and details of its operation?

Mr. Long: The specifications as to how express work should be handled there.

Mr. Crawford: May I ask, in all respect to Mr. Long if the witness can be permitted to answer the questions I'd like to examine him and find out just—

Mr. Long: Well, Mr. Examiner, the definition in the Act, as I understand it, is that the employer must have the right of continuing supervision as to the manner in which the work was performed. Now, in the beginning it is obvious that the agent had to be instructed as to

1418 the work itself. We concede that. But after h obtained his instructions, the question arises, as I see it, as to whether or not there was supervision of the manner in which the work was performed.

Mr. Crawford: That is what I'm going to lead up to, Mr. Long.

Examiner Funk: Your questions are directed to that point?

Mr. Crawford: That's right.

Q. Now, after you received your initial instructions, you were furnished with this book—General Rules and Instructions, I believe is the designation of this book. You were and have been since, from time to time, furnished with instructions, circular letters of instructions, how to operate, the methods and details of your work?

A. Different tariff rates when they are put into effect. They send us tariff rates.

Q. And isn't it a fact that from time to time the route agent has come to your office and given you instructions, or you have asked questions on how to conduct certain operations, the methods and details of operations?

A. He visits our office, but he has never given us instructions as to how we are to operate or anything.

Q. Well, let's take an example. Suppose someone comes into your office to make a shipment and you discover probably the contents of that shipment might be poison or explosives or valuables. Are you familiar with all the details of how to handle a particular shipment of that kind?

A. You mean as to insurance on a package.

Q. Well, suppose I brought in a shipment containing explosives, packaged in a certain way. Would you just accept that shipment, or have you had instructions on how to handle such a shipment?

A. No, we never have. I wouldn't accept any explosives to ship.

Q. Well, supposing the shipper insisted it be accepted?

You would, would you not, get in touch with the Express Agency for your instructions and authorization to ship?

A. That is right.

1419 Mr. Long: Mr. Examiner, I object to that type of question. After all, the tariffs of the Express Agency provide for what shipments may be handled by the Express Agency. That question, as I see it, goes to a specification of the work; not as to how he is to lift a package, not as to how he is to wear his badge on his uniform, if he has one, and not as to where he is to perform his work, but the work itself. That question, as I see it, goes to the specifications.

Mr. Crawford: Well, with all respect to your statement, Mr. Long, I think ultimately that is a decision for the Examiner to make, but my purpose, to be frank, is to show that the Express Agency does retain the continuing authority to authorize and instruct him.

Mr. Long: I object to the question as to whether or not he could receive a shipment of explosives. That goes to the specifications of the work, and I call for a ruling on it now.

Examiner Funk: Mr. Long, do the specifications of the work call for the shipment of explosives?

Mr. Long: Yes, I believe they do. There are some exceptions to the receipt of explosives. Whether or not they could be received at a small agency, I'm not at this time prepared to say. They must be packed in a certain way. The Interstate Commerce Commission has issued rulings with respect to the manner of packing explosives because it is obvious to anybody that it would be improper to accept for shipment among other things, and on trains where passengers are carried, a shipment of explosives that was not properly packed and which might cause an explosion causing death and injury to a great many people.

Examiner Funk: Do merchant agents in Mr. Horton's class have authority to receive such shipments?

Mr. Long: I'd have to look into the classification and the rulings of the Interstate Commerce Commission before I could answer that.

Examiner Funk: You do not know of your own knowledge whether merchant agents have ever accepted such shipments?

1420 Mr. Long: I do not know.

Examiner Funk: Are there in the general rules any specifications with regard to that?

Mr. Crawford: I think the evidence will show that Mr. Horton testified two or three times, if this were done or that were done, he'd just do this or that, and I am attempting to show now that, to the contrary, Mr. Horton would, if shipments are presented to him, enlighten himself and receive instructions and authority as to how to handle that shipment from the Express Agency.

Mr. Long: Now, I'll tell you what I can do. There is a circular put out by the Traffic Department covering the handling of explosives in express transportation. That, in my opinion, is a specification as to how express business should be handled, whether it is handled by an employee or an independent contractor. If Mr. Examiner would like it, I shall furnish a copy of that.

Examiner Funk: I would like a copy furnished.

Q. You don't need to confine it to explosives. We can take a shipment of jewelry or eggs or anything else that might be called to his attention that it was a shipment he was not familiar with how to handle it, that he would contact the Agency or else he would receive instructions through circular letters, etc., how to handle such shipments. In other words, Mr. Horton, you would not take a shipment like that and, as you stated in your previous testimony, just simply throw it aside and handle it in any manner you saw fit.

A. That wouldn't be good business.

Q. Your answer is that you would not, I assume. Is that correct?—Will you please answer it for the record?

(The witness nodded in the affirmative.)

Examiner Funk: Address your answers to the reporter, Mr. Horton, so that she may record them.

Q. What is the name of the truck company that handles the express to and from Nauvoo?

1421 A. It belongs to the Express Company.

Q. The Railway Express Agency?

A. I think that is right.

Q. Does that truck deliver any express in Nauvoo?

A. Just to the station.—Just to our place of business.

By Mr. Morgan:

Q. Do you make a monthly accounting to the Express Agency, Mr. Horton?

A. I think it is the first of each month.

Q. Yes. That is on forms provided for that report, isn't it?

A. I believe that is right. Mrs. Harsh takes care of it.

Q. Now, in one section of that form, if you recall it—

Examiner Funk: Which form is that?

Mr. Morgan: That is the form of reporting his commissions from the Express Agency on a monthly basis.

Examiner Funk: Has that form been introduced here yet?

Mr. Long: I don't think it has.

Examiner Funk: Will you later introduce a copy of that form?

Mr. Long: Yes, I shall.

Q. One section is set aside for recapitulating the sources of revenue on those charges, isn't it, Mr. Horton, if you recall?

A. I believe that is correct.

Q. Yes. That includes charges for transportation of express property, does it not?

A. It does.

Q. Including money in values?

A. You mean money that is shipped?—We don't handle any currency.

Q. You do handle valuable shipments, though?

A. Yes.

Q. And you issue receipts for those valuables, don't you, to the shipper?

A. Yes.

Q. You have shipments sent C.O.D., too, do you not?

A. Yes, sir, that is right.

1422 Q. And that form, in striking up your balance in reports for the money, includes the charges for the proceeds of those C.O.D.'s?

A. I think so.

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1423 Examiner Funk: Do you have any further questions, Mr. Long?

Mr. Long: Yes.

Redirect Examination by Mr. Long.

Q. I think perhaps it would be advisable at this time to ask Mr. Horton if this is the original Form 7050 prepared at his office for the month of May 1948. (Handing Form 7050 to Mr. Horton.)

A. That was prepared by Mrs. Harsh.

Q. In your office, for the month of May 1948?

A. That is right. She is authorized to sign my name.

Mr. Long: I offer that in evidence as Exhibit X.

(Railway Express Agency Form No. 7050, Receipts and Expenses of Commission Agents, covering the month of May 1948, at Nauvoo, Illinois, was received in evidence and marked EXHIBIT NO. X-A.)

Q. And I show you Form 7050, which on the face thereof covers from November 1 to November 30, 1946, and ask you if that was prepared in your office as the original.

A. That was also prepared by Mrs. Harsh.

Mr. Long: I offer that in evidence.

Examiner Funk: It will be so received.

(Railway Express Agency Form No. 7050, Receipts and Expenses of Commission Agents, covering the month of November 1946, at Nauvoo, Illinois, was received in evidence and marked EXHIBIT NO. X-B.)

Q. And I show you Form 7050, which purports to cover the period from October 1 to October 31, 1946, and ask you if that is the original 7050 so prepared in your office.

A. Yes, sir.

Mr. Long: I offer that as an exhibit.

Examiner Funk: It will be received.

(Railway Express Agency Form No. 7050, Receipts an Expenses of Commission Agents, covering the month o October 1946, at Nauvoo, Illinois, was received in evidenc and marked EXHIBIT NO. X-C.)

Mr. Long: That is all I have.

Examiner Funk: Do you have any further question Mr. Hassenauer?

1424 Mr. Hassenauer: No, thank you.

Examiner Funk: Mr. Long, for the purpose o the record, I believe when Mr. Horton first started testifying, he made reference to a hearing at Springfield befor the Interstate Commerce Commission about the discontinuance of express service. That was not with respect to th discontinuance of an agency, was it? Or was it with reference to that?

Mr. Long: That was with respect to the discontinuanc of the agency at Nauvoo.

Examiner Funk: What kind of an agency did you hav there, Mr. Long?

Mr. Long: Do you know, Mr. McAdam?

Mr. McAdam: Yes.

Examiner Funk: It is not in the exhibit as a merchant agency.

Mr. McAdam: The agency was under the jurisdiction of the St. Louis Department prior to my taking over the agency, and as I understand it, they had a drayman who had a certificate of necessity or convenience to drive between Fort Madison and Nauvoo, and he also handled the express at Nauvoo, acted as agent.

Examiner Funk: Do you know what type of agent he was considered to be?

Mr. McAdam: He would be considered a merchant agent.

Examiner Funk: The reason I asked that question, Mr. Long, there is nothing in your exhibits. I find Nauvoo was not listed as a merchant agency prior to Mr. Horton.

Mr. McAdams: It was without service for about a year, I believe, during the hearing.

Examiner Funk: This purports to go back to 1942. But you state it was a merchant agency?

Mr. McAdam: Yes, sir.

1425 By Examiner Funk:

Q. Mr. Horton, do you have any funds invested in the equipment used in the performance of express work?

A. At our place of business, in our trucks.

Q. But that is invested in Horton's Standard Service?

A. It is invested in Horton's Standard Service.

Q. There is nothing invested in express?

A. No.

Q. Do you have a separate agreement with the Express Agency in regard to pickup and delivery work, or is that part of your over-all work?

A. We get 10¢ for pickup and 10¢ for delivery. There is no agreement.

Q. I meant, Mr. Horton, when you took over this agency and became the express agent there, did you at the same time enter into this pickup and delivery agreement?

A. I can't answer that, but I believe not. Later on, they told us if we wanted to receive and pick up, they'd pay us at the rate of 10¢ for pickup and delivery. I don't remember any agreement.

Examiner Funk: Does anyone else have any further questions to ask Mr. Horton?

Mr. Hassenauer: Mr. Examiner, I would like to ask Mr. Horton one further question. I notice in one of these exhibits introduced by the Express Agency he is listed here as a merchant agent at Nauvoo, Illinois, from March 18, 1944, to December 31, 1945—Exhibit V-A. The amount of express commissions earned by you during that period was $613.50. Can you tell us somewhat in detail, Mr. Horton, how you applied for your Social Security number?

Witness: I have had a Social Security number for quite a while.

Mr. Hassenauer: Had you ever had any railroad service? Have you ever been employed by a railroad company?

Witness: No, sir.

Examiner Funk: If there are no further questions, Mr. Horton, you may be excused temporarily.

1426 (Whereupon the hearing recessed at 12:30 p. m., reconvening at 1:45 p. m.)

Examiner Funk: The Examiner has been advised that the Clerks' organization wishes to ask a further question of Mr. Horton.

By Mr. Crawford:

Q. Mr. Horton, there is one part of your testimony that I didn't get quite clear. I wanted to clarify it on that point. You mentioned the issuance of receipts. I think you said something about at one time for certain transactions you issued receipts of your company, your partnership or whatever it is there. But isn't it a fact that when you receipt for a shipment, an express shipment, that you have no choice as to the issuance of a receipt other than to issue the prescribed form of the uniform express receipt?

Mr. Long: Mr. Examiner, that is true as a matter of law, not as a matter of fact, because if we issued a receipt other than the uniform express receipt, the terms and conditions of the uniform express receipt would apply rather than any other type of receipt issued. That is a matter of law.

Mr. Crawford: Well, I wanted to clear it up. I understood him to say he issued some other receipts in his own business.

Mr. Long: Well, it may have been a temporary receipt.

Examiner Funk: The receipts you issue are the uniform receipts of the Express Company?

Witness: You mean if somebody picks up a package?

Mr. Crawford: On express business.

A. Mrs. Harsh has made the receipts out. If she hasn't, I sign one of our own receipts that the package was received.

Examiner Funk: You mean sometimes you use your own receipts instead of Express Company receipts?

Witness: Yes, sir.

Mr. Long: I think you have reference now to a shipment that is picked up by some person in the town of Nauvoo.

1427 A. That is right.

Mr. Long: Now, suppose a shipment is delivered to you for transportation by express from Nauvoo to some other point.

Witness: Then I make it out on your form.

Q. That is the outbound shipment.

A. That is right. I thought you meant somebody coming into our place of business to pick up something.

Examiner Funk: Mr. Long, do you have another question?

Mr. Long: Yes, there is one question.

By Mr. Long:

Q. I may have asked it before, but I would like to ask Mr. Horton this. Does this lady employee of yours work on express only, or does she work on express and other business of yours in Nauvoo?

A. No. The time she spends on express is, of course, very little.

Q. Then I take it the vast majority of her time in your employ is spent on work other than express work?

A. That is correct.

Q. Is that true in respect to your partner?

A. Yes. Maybe it takes a half hour a day for the express business, some days maybe a little more.

Mr. Hassenauer: Pardon me, Mr. Examiner. I'd like to have a look at this Application for Employment.

(Exhibit No. IX handed to Mr. Hassenauer.)

By Mr. Morgan:

Q. Mr. Horton, in sending out a prepaid shipment, don't you fill out a prepaid waybill for that?

A. It is a form.

Q. That is an Express Agency form that you are obliged to fill out, on a prepaid shipment?

A. Yes.

Examiner Funk: Do you have any questions, Mr. Hassenauer?

Mr. Hassenauer: Yes, Mr. Examiner.

1428 I haven't completed my check of this, but I'd like to ask Mr. Horton again. I have referred to that exhibit of the Express Agency and pointed out that he had a Social Security number with the 700 prefix. I may be wrong about this, Mr. Examiner, but it is my understanding that where there is such a Social Security num ber with a 700 prefix it would indicate that the person who has such a number has had railroad experience.

Examiner Funk: You mean, Mr. Hassenauer, it is one of the railroad series?

Mr. Hassenauer: Yes, sir. His prefix was 723, as I recall, and I asked Mr. Horton if he was ever employed by a railroad before, and the answer was no.

By Mr. Hassenauer:

Q. Do you recall just how you got this Social Security number?

A. I was assigned a form to take an Express Agency position, as a matter of form, I believe.

Examiner Funk: That was the first time you had a Social Security number?

Witness: I guess.

Q. My understanding from your testimony this morning was that you had a Social Security number for some time. Now, do you wish to indicate to the Examiner that your Social Security number was given you at the time you took over the express business?

A. It must have been. I haven't had any use for a Social Security number before. It came, I imagine, when I signed that contract with the Express Agency.

Q. I noticed that on your application for employment you listed yourself as a farmer, and you do not list any other employment. That is, you were never engaged in any other employment?

A. Farmer? Well, I can list that. I have an orchard.

Q. You have listed a farmer as your business when you filled out this form.

1429 A. That was my dad's occupation. It is not mine.

Q. Did you engage in farm business with him at any time?

A. When I was a youngster, before I moved into town, yes, sir. I've been a farmer.

Examiner Funk: At the time you took this Expres Agency work, Mr. Horton, were you then engaged in thi Horton's Service?

Witness: Yes, sir.

Q. You were operating a Standard Oil station an selling home appliances?

A. That is right. We have a home appliance busines a coal business.

Examiner Funk: And you were operating these businesses at the time you entered into this agreement wit the Express Agency?

Witness: Yes, sir.

Mr. Long: Do you recall, Mr. Horton, when you bega the business now called Horton's Service?

Witness: The 8th day of July, 1933.

Mr. Long: So that you had been in that business approximately eleven years before you took the expres agency?

Witness: That is right.

Mr. Long: I have no further questions.

Mr. Morgan: No further questions.

Examiner Funk: Mr. Horton has indicated that he woul like to leave this afternoon. Is there anyone who wishe to recall him, or do you wish to have him held here unti the end of the day?

(No response.)

Examiner Funk: Mr. Horton, you may be excused a this time. However, as I indicated to you earlier in th hearing, there is a possibility you may be recalled late

Mr. Long: Thank you for coming, Mr. Horton.

(Mr. Horton was dismissed.)

Examiner Funk: Mr. Burns has requested permissio to testify at this time because of the fact that he must catc an early train. There being no objection, Mr. Burns, wi you take the witness stand.

1430 MR. A. H. BURNS, having been first duly sworn, was examined and testified as follows:

By Examiner Funk:

Q. Do you wish to make any statement?

A. Yes, sir. I entered the employ of the Express Company in 1914, as an agent for the Express Company.

Q. Were you at that time a salaried employee, or were you on a commission basis?

A. I was on a commission basis. At that time, they were paying a rental for space in a building that I was renting for their express, and they impressed upon us at different times that that was the Express place of business.

Mr. Long: I could object and move to strike out the term "impressed," but I take it you want this man to tell the story in his own words.

Examiner Funk: Yes, since he is not represented by counsel, if you have no objection.

Mr. Long: I just want the record to show that I am not conceding that when he says "impressed," it is a fact, and that I am permitting him to testify in his own way with the understanding, of course, that ordinarily, if he had counsel, we would be objecting to the use of such terminology.

A. I was under their direct supervision at all times. One time, I wrote them and asked them, if I wanted to take a day off—

Mr. Long: Now, here we will have to object and ask that he produce the writing that he refers to.

Q. Mr. Burns, when you say "them," are you referring to—

A. Our superintendent.

Q. Did you say you wrote him a letter?

A. Wrote him a letter.

Q. Do you have that letter with you?

A. No. I remember that I wrote that letter and
1431 asked if I could be absent from meeting trains and
signing for valuables, and my answer was no.

Mr. Long: Well, I have no objection to that. That is part of the specifications of the job.

A. I have continued as an express agent all these years, and I feel that I should have the benefit of this Act.

Q. Are you engaged in any other business?

A. We were in the feed business when we took the agency. We are still in it.

Q. You are still engaged in the feed business?

A. Yes, sir.

Q. About what percentage of your income is derived from the Express Company?

A. At the present, it is half. At one time, it was three-fourths.

Q. When did this so-called rental agreement, as you call it, end—or is it still in effect?

A. It is still in effect.

Q. Do you mean that the Express Agency now pays rent for the space you occupy?

A. Yes. They are paying rental for their space.

Q. And that is the space in which the express offic is operated?

A. Where the express is kept, yes, sir.

Q. Is the work of handling express performed in this space?

A. Not in the space where the express is kept.

Q. Where is it performed?

A. In an office across from there.

Examiner Funk: Mr. Morgan, would you like to conduct a direct examination of this gentleman, as he has n counsel present? Will that be satisfactory, Mr. Long?

Mr. Long: That is quite all right..

1432 ***Direct Examination by Mr. Morgan.***

Q. Do you conduct all the duties of the express that is handled at your office in this way, Mr. Burns? Do you conduct, for example, pickup and delivery service?

A. Yes.

Q. Do you use all of the Express Agency's forms in the conduct of that business?

A. Yes, sir.

Q. Do you sell the financial paper of the American Express Company at your office?

A. Yes, sir.

Q. Do you make an accounting of the proceeds of the money orders on your reports to the Railway Express Agency?

A. Yes, sir.

Q. How often do you report?

A. We report the financial report weekly, and then when it comes to the final balance, at the end of the month.

Q. Is there anything in your instructions that says anything about the amount of money that you may retain on hand overnight, for example?

A. There has been no set amount we can retain. Their money is kept separate—the express money is separately kept from any other monies, and a balance kept every day.

Q. Who checks your accounts?

A. I do, or my daughter.

Q. And finally, does the route agent have anything to do—

A. Oh, yes.

Q. How often does he come around?

A. About every thirty days.

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1433 Q. Is your office directly on a rail line?

A. The office is not, but the rail lines run through our point.

Q. Are you served by an over-the-road truck route?

A. No, sir.

Q. Well, are you instructed to get business out— You are on the G. M. & O. Railroad?

A. Yes, sir.

Q. Are you instructed to get business out on certain trains?—For example, if it be received in the late evening, to be sure to get that out on the morning train, either north or south, as the case may be?

A. The first route out, yes, sir.

Q. The first route out. The first train out?

A. Yes, sir.

Q. You understand those are your instructions and you are obliged to comply with them. Is that correct?

A. Yes, sir.

Q. What do you do with the money that you get, Mr. Burns?

A. We keep it in our express safe, except we remit it to the depository in St. Louis.

Q. Do you deliver money and valuables to an express messenger that operates on the G. M. & O. passing through your town?

A. Yes, sir, and in Missouri, Illinois, also.

Q. On prepaid shipments, you make out a prepaid waybill?

A. Yes, sir.

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1434 By Mr. Crawford:

Q. I have reference to a situation that he explained, writing to the superintendent, etc., and his testimony as to the operation. Now, based upon that testimony, Mr. Burns, have you always considered yourself as being under the continuing supervision and instruction of the Railway Express Agency in your operations?

A. Yes, sir.

Mr. Long: I object.

Examiner Funk: I think you should direct your questions to the determination of whether or not he is under their supervision.

Mr. Long: I move you strike the answer.

Examiner Funk: The question and answer may stand subject to further objection when the cross-examination is completed.

Q. You testified that from time to time the route agent appeared in your office, and did he at that time or at various times give you instructions as to how the operations and the methods and details of carrying on the business should be handled?

Mr. Long: I object to that too on the same grounds. It is too general and calls for a conclusion of the witness.

By Examiner Funk:

Q. Mr. Burns, the route agent does call at your office?

A. Yes, sir.

Q. When he calls at your office, what does he say to you?

A. He makes a check of the office accounts, and of course the workings of the office.

Q. Does he offer any suggestions or criticism of your work?

1435 A. Yes, sir.

Q. Does he ever tell you how to do your work, and that you are not doing it right?

A. He tells us how to get our signs up and how to get them on our trucks if they are not on.

Q. Does he ever criticize any of the work performed by you? Tell you you are not doing it right?

A. He tells us we are doing a good job.

Q. Does your office have a copy of the Express Agency General Rules and Instructions?

A. Yes, sir.

Q. Has the route agent or anyone else in the employ of the Express Agency directed you to follow such rules and instructions?

A. Yes, sir.

Q. Can you elaborate on that a little bit?

A. Yes, sir. Well, in the shipping of money from banks to their depositories, we have had the messengers turn those shipments down, and our route agent come to town and see that those were properly sealed for shipment.

Q. Has he told you how to seal them?

A. Yes, sir—seeing that the bank had to have a certain kind of seal so we could accept them. It is up to him to take it up with the messengers to see that the shipments went out through the channels.

Q. Has he ever sent you or given you any copies of any circular instructions of any kind?

A. We receive them from the superintendent's office all the time.

Examiner Funk: Have you any further questions?

By Mr. Crawford:

Q. Do you have what we call a seasonal operation at your office, like fruit and vegetables, or any special seasons?

A. No. Our office is pretty general. There is a good bit of feed shipped.

1436 Q. Mr. Burns, do you have a Social Security number?

A. Yes, sir.

Q. When was that given to you?

A. When we were declared under the Railroad Act. I was declared as an agent under the Railway Act.

Mr. Long: Do you remember when that was, Mr. Burns? The year?

Witness: No, I don't. It was when we were required to pay the back tax and bring it up to date, and then they put us on that basis.

Mr. Long: Would you say that was about 1939?

Witness: Something like that.

By Mr. Morgan:

Q. Does the route agent instruct you respecting the solicitation of express traffic?

A. Yes, sir.

Q. Does he instruct you as to packing and marking of shipments?

A. Yes, sir. We are under direct supervision of our route agent, and our route agent is under the superintendent who is over him. Naturally, if I want anything, I go to the route agent first, then if there is something further, I can take it up with the superintendent if I didn't get an answer from him.

Mr. Morgan: No further questions.

Examiner Funk: You have some questions, Mr. Long?

Mr. Long: Yes.

Cross-Examination by Mr. Long.

Q. Mr. Burns, will you detail completely all of your business interests at Sparta, please?

A. What I'm interested in?

Q. Yes—the business that you are interested in, and the type of interest you have.

A. Well, I have this feed business, and we wholesale some groceries along with the feed, and handle the express business. That's the extent of our operations there.

1437 Q. Now, when you say "we," just whom do you mean?

A. My wife and I.

Q. Have you any children who are also interested in the business?

A. Well, I have a son that lives there, and a daughter.

Q. They are, I presume, adults?

A. Yes, sir.

Q. Do they do any other work?

A. Yes, sir.

Q. Do you pay them a salary?

A. Yes, sir.

Q. And are either or both of them married?

A. One is married.

Q. Who is married—the son or the daughter?

A. The son is married.

Q. And he lives in a home of his own there, does he?

A. Yes, sir.

Q. And his work is exclusively in the feed and express?

A. Not express. He doesn't have anything to do with that.

Q. I see. He is in the feed business and the wholesale grocery business.

A. That's right.

Q. Now, what is the name under which you operate that business?

A. Burns' Wholesale Grocery Company.

Q. And how many trucks do you use in all of your business?

A. Eleven.

Q. Eleven trucks?

A. Yes, sir—in the wholesale business.

Q. And are all those eleven trucks used daily?

A. Yes, sir.

Q. Then I presume you have some employees in addition to your son and daughter.

A. Yes, sir.

Q. And how many employees have you?

1438 A. Eighteen.

Q. Now, what is the net worth of your business?

A. $100,000.

Q. Who does the physical handling of the express business at your place of business?

A. Well, I do.

Q. And who else?

A. We have two trains that come in so close together that one man can't make them, so we will ask any employee that might be there to take the express to that depot and ask one of the other boys to put it on.

Q. Is that any one of your other eighteen employees who might do that?

A. Any one of them, I can say "You go over and put that express on."

Q. I see. Do you ever take a vacation?

A. No, sir. —I come up here today.

Q. I see. And who is taking care of the express business while you are away?

A. My daughter or son.

Q. Did you notify anybody connected with the Express Agency that you were coming up here today?

A. No, sir.

Q. And did you ask anybody connected with the Express Agency whether it would be proper for you to turn over the supervision of the express interests to your daughter for the day?

A. No, sir.

Q. Now, how did you come up? —By rail or automobile?

A. I had an automobile ride to St. Louis, and then by rail.

Q. You paid your fare, I presume?

A. Yes, sir.

Q. You expect to pay your fare going back?

A. Yes, sir.

Q. Now, do you own the building in which your feed business is conducted?

A. I do.

1439 Q. And is the express business conducted in the same building?

A. It is.

Q. So that when you say the Express Agency pays the rental for that part of the premises used in the operation of your express agency, you mean that the Express Agency pays you an allowance per month, do you not?

A. That is right. I did not own the building when I was made an agent.

Q. Did you rent the building at that time?

A. Yes.

Q. I see. And the Express Agency paid you a certain allowance per month. Is that right?

A. Yes.

Q. Now, what is the commission you receive there?

A. We receive 10% commission on the inbound and outbound for commission, and 7% for pickup and delivery services.

Q. What is your gross income per month, on the average from express operations.

A. It will average from $150 to $200 a month.

Q. And what is your gross income from all of your business, on the average, per month?

A. I don't know.

Q. Well, would you say it is as much as $1,000? Would you say it was in excess of $1,000?

A. I wish I knew. We don't know.

Q. Well, do you ever examine your books to ascertain what your gross income is per month?

A. Oh—the gross income.

Q. Yes, the gross income.

A. I thought you were talking about net income.

Q. No. I meant gross.

A. Oh, we probably have a gross income of $100,000 a month.

Q. Was that a year or a month?

A. $100,000 a month.

1440 Q. Now, who makes out the balance sheets per month in your place of business?

A. I do, and my daughter does. I have the supervision of those balance sheets.

Q. Your daughter, I suppose, does most of your paper work in your place of business?

A. In that particular department.

Q. She does most of the paper work in the express business at your agency? Is that right?

A. That is in the detail—balancing off the daily books.

Q. Well, now, do you pay Social Security on the income that your son and daughter receive in this business of yours?

A. Yes, sir.

Q. And do you pay Social Security on the wages that you pay your eighteen employees?

A. Yes, sir.

Q. Now, do you pay any Railroad Retirement tax on any of the wages or salary that is paid to any of your eighteen employees?

A. No, because I'm the agent.

Q. I just asked you if you did.

A. The reason is, I'm the agent.

Q. I didn't ask you what the reason was. —Now, who has a key to your place of business?

A. I do.

Q. Does any other representative of the Express Agency have a key to your place of business?

A. No, sir.

Q. How old are you, Mr. Burns?

A. Fifty-six.

Q. And I take it you are rather anxious to secure the benefits of a pension under the Railroad Retirement Acts?

A. Yes.

1441 Q. I think you testified that you and your daughter check your accounts. Will you explain that in detail?

A. In receiving the pay from the express patrons, I will receive the pay, or she will receive the pay, and at the end of the day she balances off that balance book where we have express money.

Q. She does all of the balancing, then?

A. Not all of it. When she is gone, that's up to me.

Q. Well, now, I suppose you supervise all of your business there, do you not?

A. Yes, sir.

Q. And in the supervision of your business, do you stay right there at the place all the time?

A. Yes, sir.

Q. How large a place is the building in which all of your business is housed? —How long is it, for instance?

A. About 150 feet long, and about 90 feet wide.

Q. 150 feet long, and 90 feet wide. Now, I presume that is partitioned off, is it not?

A. Yes, sir.

Q. And in some places you have feed, and in other places you have your wholesale groceries?

A. Yes, sir.

Q. So that when a customer calls there for feed or wholesale groceries, it is necessary for the person serving him to go to that part of your place where the stuff is stored. Now, how large a place does your Railway Express Agency occupy?

A. The space set off for them is about 15 by 20. You understand, that space is pretty near all express.

Q. Is that in addition to the storage space?

A. No, that is the part that is set off. We have many shipments there that couldn't be handled, like coal mine shipments—large shipments.

Q. Now, is the Express Agency's work performed
1442 in the same space in which you have your general
office for your business?

A. Not our general office, no.

Q. Well, how far from your general office is your express office?

A. It is downstairs, and the general office upstairs.

Q. The express office is on the ground floor, and your main office is on the second floor?

A. That's right.

Q. Now, how many employees do you have in your main office?

A. Five.

Q. And is your desk in your main office?

A. I have an office all to myself.

Q. It is off the main office on the second floor, is it?

A. Yes.

Q. And you have the telephone there, I presume?

A. Through the lower office, and a chute through the lower office.

Q. Is that telephone listed in the name of Railway Express?

A. It was last year. It isn't this year.

Q. It is not this year? Do you know why the change was made?

A. Well, I paid for it, and—

Q. You pay for the telephone there?

A. We pay for the telephone.

Q. Do you pay for light?

A. Yes, sir.

Q. Do you pay for heat?

A. Yes, sir.

Q. And you pay for water?

A. Yes, sir.

Q. Do you pay for the insurance on the building?

A. Yes, sir. We pay an extra insurance on the truck to handle the express.

Q. You pay for the gas and the oil in the operation of the truck, and you pay for insurance on the truck?

1443 A. We pay extra on account of handling express.

Q. Now, how many trucks do you use in the handling of pickup and delivery of Railway Express Agency shipments?

A. One.

Q. And what type of truck is it?

A. That is a three-quarter-ton Chevrolet.

Q. And how long have you had that?

A. One year.

Q. You bought it yourself, did you?

A. That is right.

Q. And what color is it?

A. Red.

Q. What signs, if any, are on it?

A. None on this one. The one was replaced—

Q. None on that at all?

A. The replaced one had a sign on each side. The route agent hasn't been around yet.

Q. You have had this for a year and the route agent hasn't been around yet?

A. No. We have been trying to get him around.

Q. But he hasn't been there for the past year?

A. He's been there probably, I guess—dropped in and out.

Q. I see. Well, now—

A. I'll take that back. Now, he hasn't said anything about the truck. He's been there.

Q. I see. He hasn't said anything about the truck?

A. That is right.

Q. He has probably seen the truck, though?

A. Well, we was afraid he was going to question it.

Q. Now, while you are occupying your private office on the second floor, who takes care of the express business on the main floor?

A. I have a set of express books in my desk, and 1444 if anything should come up on the lower floor about express, I'll give them their answers.

Q. Well, suppose somebody brought a shipment to the first floor there and wanted it consigned to somebody in Chicago, say. Would you run downstairs to the first floor and make out —

A. I'll take it down.

Q. I see. You would run downstairs from your private office to the main floor and take care of it, would you not?

A. Yes.—The doctor came in with one the other night after five o'clock and I went down and took care of it.

Q. Well, after five o'clock, I presume your regular employees were on the way home.

A. That's right. At seventy-forty-two, I meet a train.

Q. At three o'clock in the afternoon, let's say, would you do the same thing? Would you run from your office down to the main floor?

A. If there is nobody to receive it.

Q. Well, is there usually an employee on the first floor during the daytime?

A. That is right, and I'm there a good bit of the time myself.

Q. And is that employee usually there to take care of express shipments?

A. Not necessarily.

Q. Does he ever take care of express shipments?

A. Any of them would that work there.

Q. Anybody who works there around the first floor would be taking care of express shipments. Well, now, how many employees might be working around there to receive a shipment?

A. Five.

Q. And do they include your son and daughter?

A. Yes, sir.

Q. Are your son and daughter working on the mai floor regularly?

A. Yes, sir.

Q. And they are not included in the five employees tha work in the main office on the second floor?

1445 A. No, sir.

Q. Now, do you know when the route agent firs learned that you had a new truck for use in the pickup an delivery of express?

A. No, I wouldn't know exactly.

Q. And do you know when the superintendent havin jurisdiction over that territory first learned of the fac that you had a new truck?

A. No, sir.

Q. So that you just bought the truck without notifyin anybody in connection with Railway Express Agency?

A. Yes, sir.

Q. And you didn't consult them as to the size or typ of truck that you were to buy and use, did you?

A. No, sir.

Q. Now, the records of your express business, I presume, are maintained on the first floor?

A. Yes.

Q. So that it is possible for the route agent to hav come there and checked the records of the Express Agenc on the first floor without you seeing him. Is that right

A. No, sir.

Q. And why is that not right?

A. Because that wouldn't be done without notifyin me, as agent.

Q. You wouldn't let him in there until you were notified?

A. Oh, he could come in, but I'd be notified that he was there.

Q. Who would notify you?

A. My daughter.

Q. Is she instructed to do so?

A. Yes, sir.

Q. Now, you say that the telephone there is not listed under Railway Express Agency in the directory in Sparta, for at least the last year.

A. Yes, sir.

Q. Do you know definitely as to whether Railway
1446 Express was listed prior to the last year?

A. Not by them giving me orders to list it.

Q. Well, I didn't ask you that. I asked you whether you knew of your own knowledge whether Railway Express Agency was listed in the telephone directory for Sparta—

A. I would say yes.

Q. And what do you base that answer on?

A. Well, we have a certain phone that the express business comes in over, and I do know to my knowledge that I would advertise express business on Phone 71.

Q. You do advertise express business?

A. In advertising on a catalog, a telephone book, I would set up the telephones for the different departments.

Q. I see. How many telephones have you there?

A. Four.

Q. And you say you would set this advertising up for the different departments. Now, you consider, I take it, then, that your express is one of the departments of your business?

A. Yes, sir. That was the feed and express business—retail feed and express business—Phone 71.

Q. Retail feed and express business used Telephone 71? Is that a number for the town of Sparta, or is that a number on your exchange?

A. No, that's a number for Sparta.

Q. I see. Well, now, this advertising of express that you did, I suppose, was done on your own.

A. That is right. It prevented confusion from the other departments.

Q. When did you last advertise express?

A. I would say last week on the fair catalog.

Q. What fair catalog was that?

A. Randolph County Fair.

Q. When was the route agent last out there?

A. About six months ago.

1447 Q. Did he make a check—

A. I take that back. He dropped through about three months ago.

Q. And what did he do at that time?

A. Promised to come back right away.

Q. Did he make a check of your accounts at that time?

A. No, sir. He promised he'd be back, and we have written him to come back, and he telephoned us a few days ago and said he's on the way to Sparta; but he never got there.

Q. Well, now, I take it you didn't consult the route agent then when you advertised Railway Express on Randolph County Fair catalog?

A. That is right.

Q. And that was paid for by yourself?

A. Yes, sir.

Q. The Express Agency had nothing whatever to do with that?

A. That is right.

Q. Is the space which you now use for the transaction of Railway Express business—was the same space used since you started as agent?

A. Yes, sir.

Q. No change has been made?

A. No, sir.

Q. Has your business been extended any? I mean your feed and wholesale groceries business.

A. It has grown.

Q. And has that caused you to make your building in which your business is carried on, larger?

A. Yes. We take in a good deal more space than when I was made agent.

Q. What did you do? Buy the premises that you rented when you first started there as agent?

A. Yes, sir.

Q. When did you begin the business of feed and wholesale groceries?

A. On February 12, 1912. That is when the feed business started.

Q. And who, if anybody, was in partnership with you at that time?

1448 A. My father was.

Q. And did your father pay you a salary, or were you actually a partner?

A. I was actually a partner.

Q. And your father divided the net income from the business in a certain proportion, I presume?

A. We divided equally, yes, sir, until 1922. Then I bought his interest in 1922.

Q. And I presume that at that time the express business was considered also as a department of your general business?

A. No, sir. I was agent of the Express Company.

Examiner Funk: Was the income from the express divided with your father?

Witness: No. That was mine.

Q. Now, how many employees did your business have in 1912, if you remember?

A. Two.

Q. Just you and your father?

A. Two employees.

Q. And they, I presume, operated the trucks?

A. Yes, but not express trucks at that time.

Q. You had a horse and wagon, didn't you?

A. Well, I operated that for years, myself.

Q. Well, do you operate the truck that performs pickup and delivery service there now?

A. I meet—

Q. Now, I just asked you—

A. Yes, sir, I do.

Q. You do. And you do that each day?

A. Yes, sir.

Q. And while you do that, of course, you are not in your office up on the second floor of your business. Now, how many shipments do you handle in that truck?

1449 A. You mean—

Q. Per day.

A. We handle from 1,000 to 1,500 a month. Now, that is around 30 shipments a day.

Q. What time of the day do you perform your pickup and delivery service?

A. The train that comes in at night is delivered the next morning, and we have a train in at eleven o'clock.

Q. Well, what time the next morning is this delivery made?

A. Eight-thirty, nine o'clock.

Q. Eight-thirty to nine a.m. And how many shipments do you handle on that delivery?

A. From 3 to 6, probably.

Q. And when do you make your next delivery?

A. There is a train in at eleven o'clock. If there is anything perishable, it is delivered right away.

Q. And do you deliver that yourself, personally?

A. Not all of them.

Q. Well, now, let's get the record straight. I misunderstood you, then, when I understood you performed all the pickup and delivery personally. Now, do you or do you not?

A. I have one employee I'll send out to make those pickups.

Q. Well, he is the one that performs the pickup and delivery service for you?

A. Some of it.

Q. Does he do most of it?

A. He and I are about equal.

Examiner Funk: In other words, you mean you both perform pickup and delivery service, and it is about fifty-fifty?

Witness: That is right.

Q. Does he perform the morning pickup and delivery?

A. You mean meet the train?

Q. Well, I'm speaking of picking up and delivering from customers.

1450 A. Yes, he has the morning pickup.

Q. And that is at eight-thirty to nine, and also there is a train at eleven, you say. Does he perform that too?

A. He meets that train.

Q. Then what happens to the express after it is brought to the office?

A. We write the bills up, get them ready for delivery.

Q. When you say "we", who are "we"?

A. I.

Q. And who else?

A. My daughter.

Q. And who else?

A. That is all.

Q. You work out the delivery sheets, and then what happens to the express?

A. It is delivered. There is another train in at one-fifty-eight.

Q. Well, do you deliver this that comes in at eleven a.m. right away?

A. If there isn't anything perishable, it is held until—

Q. Well, if it is perishable, who delivers it?

A. This party will deliver it, or I'll deliver it.

Q. Well, now, who generally delivers it?

A. He generally delivers it.

Q. Then you say there is an afternoon train. What time does that arrive?

A. One-fifty-eight.

Q. And who picks up the express from that train?

A. This employee.

Q. And what does he do?

A. Takes it to the office.

Q. What happens to it then?

A. The bills are worked up for delivery.

Q. By you and your daughter?

A. Yes, sir.

Q. Now, while you are doing that, who answers the telephone up in your main office?

1451 A. We have one girl that answers the telephones.

Q. I see. And if you are needed for some transaction with respect to this $100,000-a-month business of yours, I suppose you answer the telephone?

A. She will buzz me twice. Two buzzes is mine.

Q. And while you are doing that, your daughter takes care of the express. Is that right?

A. Yes.

Q. Well, after the express is worked up, then what happens to this afternoon express?

A. Some of it is called for, and some of it is delivered.

Q. Who does the delivery?

A. This other party, this one man, will deliver. I send him out with it, or I'll do it.

Q. Well, as a matter of fact, this man practically does all of your pickup and delivery with that little red Chevrolet truck does he not?

A. The one truck does it, and he and I handle it.

Q. I asked you whether or not it is a fact that he does practically all of that work.

A. No.

Examiner Funk: I believe Mr. Burns testified that it was about fifty-fifty. Is that correct, Mr. Burns?

Witness: That is correct.

Q. Now, do you make any attempt to allocate the time of any of your employees who work on express to express work in your records?

A. Allocate certain work that they do?

Q. Do you make any differentiation in your records as to the work performed by your employees on express and the work performed by your employees on other work?

A. No, sir.

Q. So your records show merely that all of these eighteen employees and your daughter and your son are
1452 working for your business, which is called Burns'
Wholesale Grocery Company. Is that right?

A. They are working for A. H. Burns, doing business as Wholesale Grocery Company, and A. H. Burns as an agent of the Express Company.

Q. I see. But you don't differentiate between the time they spend for work for A. H. Burns as agent, and as Burns Wholesale Grocery Company.

A. No, sir, and I don't specify they have anything to do with express. I'm the agent of the Express Company.

Examiner Funk: How much time do you personally devote each day to express work? Approximately?

Witness: From two to three hours.

Q. And how many man hours would you say your employees and your daughter and son devote to Railway Express?

A. It takes about seven to eight working hours to handle the express.

Q. Does that include your two to three hours?

A. That's right.

Q. So that you devote two to three, your other employees devote five to six. Is that right?

A. That is right.

Q. Does this red Chevrolet of yours have any signs on it at all?

A. It does not.

Q. Does it have your name on it?

A. It has Burns' Wholesale Grocery on it.

Q. It does. Along the side of it?

A. On the door.

Q. And that is all it has on it, as far as a name is concerned?

A. That is right. That is not our instructions though. Our instructions is to have that Express sign.

Q. I didn't ask you what your instructions were, Mr. Burns. I asked you what the actualities were.

A. And I was telling you what the actualities were.

Examiner Funk: Have you instructed the driver to have an Express sign on it?

1453 Witness: I have not.

Q. So I take it, then, that you don't follow any instructions that are given to you unless you feel inclined to do so.

A. Yes, I do follow them, but I just never got to it.

Q. I see—although you operate this truck yourself daily.

A. Yes.

Examiner Funk: How much do you have actually invested in the business which is devoted to express service only?—What is your financial investment in the equipment used for express service only?

Witness: Just that truck, which is about $1,300.

Q. What equipment does the Express Agency furnish you?

A. They furnish us with a safe and the platform trucks at the depot.

Examiner Funk: How many of those?

Witness: Two, and a desk and chair, revolver, and stationery cabinets, and all the supplies for the operation of the Express Company.

Q. What type of desk is this, Mr. Burns?

A. A flat-topped desk.

Examiner Funk: Who has the combination to the safe?

Witness: I do.

Examiner Funk: And the Express Agency and the messengers have the combination?

Witness: They have it in a sealed envelope.

Q. This desk you specify—how long have you had that?

A. I wouldn't know, but I know that desk belongs to me.

Q. Well, did you get it in 1914?

A. No. We got it since then. I don't think they furnished me a desk in 1914.—I believe they did, a high topped one.

Examiner Funk: Is this a replacement then?

Witness: Yes.

Q. Do you know what number that desk has of the Express Agency?

A. I don't know. I have a record of it.

1454 Q. These chairs you speak of—when did you get those?

A. I would say fifteen years ago.

Q. Did you request them or did they just voluntarily bring them to you?

A. Both.

Examiner Funk: What do you mean, both?

Witness: Well, we asked for a desk and a chair, and finally they brought them. They furnished the revolver and safe and cabinets.

Q. How about scales. You have your own scales in the feed business, haven't you?

A. Yes.

Examiner Funk: Does the Express Agency furnish any scales at all?

Witness: No.

By Examiner Funk:

Q. Mr. Burns, from your testimony, you state that when you started out there as agent, you were in business with your father for a time. Was there a period of time, then, during which you alone performed express service?

A. Yes, sir.

Q. When did that cease?

A. My doing all the actual work?

Q. Yes. When did you have someone else to help you for the first time?

A. I'd say that would be along in 1927 or '28.

Q. Did you always perform pickup and delivery service?

A. Yes, sir.

Q. So the two started about the same time.

A. It was two years later. We got the express in 1914. I handled the express, made all the reports, for years.

Q. You say you got the express in 1914. Do you mean that your pickup and delivery work started in 1914?

A. Yes, sir.

Q. And you were paid for that on a commission basis also?

1455 A. No. Back at that time, we were paid, when we first took it, $10 a month—that was horse and wagon days—and $5 for rent.

Q. Rent of what?

A. Of the office. That's what they paid in those days.

Q. You say they paid rent for the office. What particular space is it they paid the rent for?—The first floor office?

A. The first floor. The space for their express office. We have had a route agent say to us, "Now, listen, we want this express kept here," and we have had letters specifying—

Mr. Long: Now, I'd like to see those letters.

Q. If you have any such letters, will you please furnish them?—What is the present rent allowance?

A. $10.

Q. You say you started out doing the pickup and delivery work with a horse and wagon. Did the Express Agency pay any of the expenses?

A. Yes. They paid $10 for the horse and wagon.

Q. I mean, did they pay you for the upkeep of the wagon and feed of the horse?

A. No.

Q. And now how are you paid for the pickup and delivery?

A. 7%.

Q. When did that start?

A. About ten years ago, I'd say.

Q. That is 7% of the business handled by the pickup and delivery?

A. Yes.

Examiner Funk: Any further questions, Mr. Long?

Mr. Long: Yes.

By Mr. Long:

Q. This revolver you speak of—who has that?

A. I do.

Q. Do you ever use it?

A. No.

1456 Q. Where do you keep it, anyway?

A. In my desk drawer.

Q. Is it an old—

A. No. It is a good one. It has been furnished recently.

Q. I was just curious as to why you needed a revolver.

A. I'd put one in my pocket if I was going out with money. I've taken it when there was a lot of money going out, and had somebody take the money and followed it.

Examiner Funk: You say the revolver was furnished you recently. Did you have a gun prior to that time?

Witness: Yes. They took it up and gave me a better one.

Q. Do you know the number of that gun?

A. We have it.—No, I don't.

Q. Do you know who furnished it to you?

A. The Express Company.

Q. Did the route agent bring it out there?

A. Yes.

Q. What is his name?

A. Howell.

Q. H-o-w-e-l-l?

A. That's right.

Q. You say that this truck of yours was used exclusively in the handling of pickup and delivery for Railway Express?

A. No, I didn't say that. I said no other truck was used. We pay an extra insurance for this particular truck to handle express.

Q. But that truck is also used in your other business?

A. Yes, sir—not very much.

Q. Now, in making your reports as to your commissions, your gross commissions, in the operation of your express agency, I understand you make those on Form 7050. Do you know what that form is?

A. You mean the balance sheet?

Q. No, it is not the balance sheet.

1457 A. Do you have a copy of the form, Mr. Long?

Q. I show you Exhibit No. X-A and ask you if you ever made out a form such as that.

A. Yes, sir.

Q. Did you make it out or did your daughter make it out?

A. I made it out.

Q. And what did you show on that form?

A. We showed our commissions and our pickup and delivery expense.

Q. You show your expenses, do you, on it?

A. Yes, sir.

Q. Well, now, how do you allocate the expenses of the operation of your truck to the pickup and delivery of express?

A. That's 7% on the amount of—

Q. Well, that is your income. Now, do you make any record on that 7050 as to the expense of operation of your vehicle?

A. This is not the form we make up.

Q. It isn't the form you make up?

A. We make up a trial balance sheet, but this is not the one we make up, because ours is all made up in one, and our commission is taken off—

Q. Well, then, as far as you know you never made that report 7050. Is that right?

A. Not this one.

Q. You are sure of that?

A. We make up the—

Q. Well, I asked you whether or not you ever made that form out. What is your answer?

A. I haven't made that particular form.

Q. Do you suppose your daughter might have made it?

A. I made the vendor forms for—

Q. Well, I'm speaking about this form, Mr. Burns, and I'd like for us to stick to that form if you don't mind. Now, I'm asking you whether or not you have any recollection of ever making out that form.

1458 A. This particular form I haven't made.

Q. And do you know of your own knowledge whether your daughter has ever made out that form?

A. Not that form, no.

Q. She might have made out that form?

A. She could have.

Mr. Long: That's all.

Examiner Funk: Mr. Hassenauer?

Mr. Hassenauer: I just have one or two questions.

By Mr. Hassenauer:

Q. Mr. Burns, in reporting the amount of revenue received by you in handling express, you make out a monthly report to the Express Agency?

A. That's right.

Q. Do you know the number of that form or the report you make out?

A. I don't know what the number of it is.

Q. You have made a lot of them out over a period of years?

A. Yes, sir.

Q. Does that form provide for information to the Express Agency of the payment by you to any of your employees for assisting in handling express?

A. No, sir.

Q. It does not so provide?

A. No, sir.

Q. Do you pay any of your employees any compensation for assisting in handling express?

A. No, sir.

Q. This driver of the Chevrolet truck, then, is paid by you out of income received by you from your wholesale grocery business?

A. Yes, sir.

Q. I don't know whether I was correct in understanding you or not, but I understood you to say that the income from your express business and that received by you
1459 from the wholesale grocery business was about fifty-fifty.

A. That's right.

Q. And I heard you testify, if my hearing serves me right, that your gross income from your grocery business amounted to about $100,000 a month.

A. That's right.

Q. That would be $1,200,000 a year.

A. That's right.

Q. And in an exhibit here by the Express Agency, in checking the income which you received, the gross income which you received over a period of years, the average gross income derived by you from handling expenses amounted to about $93 a month.

A. Over that period of time?

Q. Yes, sir.

A. It must be more than that, because I know last year it was $2,100 and something.

Q. For one year?

A. That is right.

Q. You would know, would you not, from your own business, the percent which you would receive toward your net income from operating the wholesale grocery business? Would that percent be anywhere from 6 to 10% of the gross annual income?

A. You mean the net?

Q. Yes. What would the net amount to? 6 to 10% of the gross annual income?

A. You mean the net income?

Q. Yes. What percent of the gross income do you receive as a net income for your business, on an annual basis?

A. I was figuring my net annual income would be around $5,000, and I figured the express would be about half.

Q. On a gross income of $1,200,000, operating the wholesale grocery business, you receive $5,000 a year net income?

1460 A. Do you know we lose money sometimes?

Q. I'm just asking you the question. Is that correct?

Mr. Long: Excuse me. I think his answer was that it was $2,500 from that business, half from the express and half from the feed business. Is that right, Mr. Burns?

Witness: Yes.

Q. As I understand it, you have not reported to the Express Agency any compensation whatsoever to any of your employees for assisting in handling express.

A. That is right.

Q. You have done it all yourself?

A. Yes.

Q. Except the operator of the truck, who calls for the express and delivers it.

A. So far as the reports are, I'm the agent and there is nobody else.

Q. Have you ever delivered any express in that truck yourself?

A. Yes, sir.

Q. Do you have one man assigned to the handling of that express by that truck, or do you have various employees handling the express by means of that truck?

A. Well, it could be anybody. If I wasn't available to take care of it, we'd see that it was serviced by one of the fellows that were around there.

Mr. Hassenauer: That is all.

Examiner Funk: Mr. Morgan, or you, Mr. Crawford?

Mr. Crawford: I wanted to ask one question there.

Redirect Examination by Mr. Crawford.

Q. You spoke of the revolver, and I think you said they supplied you with four-wheel trucks.

A. That is right.

1461 Q. Who keeps up the repair, if necessary, on this equipment?

A. They do—the Railway Express.

By Mr. Morgan:

Q. What are the normal business hours that you recognize that you are open for the public?

A. From eight to five.

Q. Now, you said you met a train at seven-forty-two. You meant seven-forty-two p. m.?

A. That is right.

Q. That is beyond the business hours.

A. Yes, sir.

Q. Do you meet that train according to your understanding of your instructions from Railway Express Agency?

A. Yes, sir.

Q. If, for example the seven-forty-two train would be late and didn't get there until nine o'clock, would you understand your instructions from the Express Agency to be that you should meet that train at whatever hour it arrived?

A. Yes, sir. I'm paid $10 extra for meeting this train at seven-forty-two.

Q. Or whatever other hour it might come?

A. Well, that is the due time, and whatever time it arrived, sure.

Q. Now, you have had a revolver for a good many years, an Express Agency revolver, and they supplied you with a new one recently?

A. Some four, five years back.

Q. Now, as to soliciting of business, are you instructed in respect to that by the Express Agency?

A. Yes.

Mr. Morgan: No further questions.

Examiner Funk: Do you have any further questions, Mr. Long?

Mr. Long: Yes, I have a few.

1462 *Recross Examination by Mr. Long.*

Q. Now, these platform trucks you specify—they are down at the railroad station, are they not?

A. Yes, sir.

Q. And so far as you know they might belong to the railroad?

A. No. They belong to the Express Company.

Q. Does the railroad have any platform trucks down there?

A. Yes, sir.

Q. Now, this Chevrolet you speak of—who takes care of the cost of repairs to that?

A. I do.

Q. The Express Agency has nothing whatever to do with that?

A. No, sir.

Q. Now, Mr. Morgan asked you something about the solicitation of business, but I understood you to say that the Express Agency had nothing whatever to do with the advertising that you had performed recently on the catalog of Randolph County Fair, in which you advertised express business. Is that right?

A. That is right.

Q. Now, this train that arrives at seven-forty-two p.m. —does that arrive daily?

A. Yes, sir.

Q. Including Sundays?

A. Yes, sir.

Q. And what employee do you have meet that train?

A. I meet that train.

Q. Personally?

A. Yes, sir.

Q. Who is meeting it tonight?

A. Probably my son.

Q. And who met it last night?

1463 A. I did.

Q. Are you sure your son will meet it tonight, or is it possible that an employee might meet it?

A. I am sure my son will meet it.

Q. Now, did you consult the Express Agency as to that before you came down here and before you arranged to have your son meet the train?

A. No, sir.

Q. Do you ever take a vacation?

A. No, sir.

Q. I suppose you have never been ill?

A. In 1918, I had typhoid fever, but they replaced me with an agent.

Examiner Funk: Who replaced you with an agent?

Witness: The Railway Express Company.

Q. You mean the predecessor of the present Railway Express Agency. The present Railway Express Agency was not in existence at that time.

A. Who was the express company at that time?

By Mr. Morgan:

* * * * *

Q. Is the Express Agency aware, to your knowledge, of the fact that you make pickup and delivery service at Sparta?

A. Well, certainly. They pay us 7%.

Q. For pickup and delivery service. Then they apparently haven't inquired as to whether you operate a Chevrolet or whether you operate a Ford, or as to the painting of either Chevrolet or Ford, is that correct?

1464 A. That is right.

Q. But they do know that you make pickup and delivery service.

A. That is right.

Examiner Funk: Mr. Burns, when did the Express Agency start paying you $10 for meeting this late train?

Witness: That must be about five years ago.

Examiner Funk: Prior to that time, did you meet that train?

Witness: Well, they changed times.

Examiner Funk: Is there any further cross-examination?

Mr. Long: Well, there are one or two questions.

By Mr. Long:

Q. I think you have already testified that one evening when a doctor in Sparta called at your place of business after five o'clock, you went down and fished out the shipment for him and delivered it to him?

A. I received his shipment.

Q. Oh, you received a shipment from him for transportation. That was after five o'clock?

A. Yes, sir.

Q. And do you do that often?

A. Quite often.

Q. Whenever any of your friends around there ask for that service, you give it to them, do you?

A. Yes, sir.

Q. And have you consulted the Express Agency as to that practice?

A. No, sir.

Q. They don't know anything about it?

A. I think they do. —I'll say yes.

Q. They haven't objected to it?

A. No, sir.

Q. And, in fact, you didn't ask them whether you could do that, did you? You just went ahead and did it, did you not?

A. Yes, sir.

• • • • •

1465 Q. Did I ask you what the population of Sparta was, Mr. Burns?

A. Approximately 3,700.

Q. You are a member of the Chamber of Commerce, are you?

A. Yes, sir.

Q. And does the Express Agency make any payments as to that?

A. No, sir.

Q. You are not entitled to free transportation over the railroads, are you?

A. You just want an answer yes or no?

Q. Well, yes, that's what I am asking for.

A. I never have had.

By Examiner Funk:

Q. Have you ever requested free transportation?

A. I requested free transportation over the Missouri-Illinois Railroad because I was an express agent.

Q. When was that?

A. In 1916.

Q. Was it granted?

A. I did not receive it. The chief clerk to the superintendent said it was granted.

1466 Mr. Long: Well, now, what the clerk said, I move we strike out.

Q. In other words, you did not receive the transportation?

A. No.—It was granted.

Mr. Long: I move we strike out "It was granted."

A. Well, it wasn't turned down on account of—

Mr. Long: Well, you didn't get it. Is that the answer, Mr. Burns?

Witness: That is right.

By Mr. Long:

Q. Who is Earl Mulholland?

A. That is the boy that takes the truck when I am not on it.

Q. And he assists you in handling express in the office, too, I believe.

A. Around the office.

Q. As well as driving the Chevrolet truck?

A. Yes, sir.

Q. You say that you have to pay an extra premium of insurance on the truck that handles the pickup and delivery of express?

A. Yes, sir.

Q. But the Express Agency makes no contribution whatever toward that premium, does it?

A. No, sir.

Mr. Long: That is all.

Examiner Funk: Any further examination by Mr. Hassenauer, or Mr. Morgan?

y Mr. Morgan:

Q. You testified, Mr. Burns, that you got copies of cir-ulars sent out by the Express Agency frequently?

A. Yes, sir.

Q. Were you familiar with them having a solicitation-or-business program on?

A. Well, at different times.

Q. Well, did your advertisement in the Randolph
467 County Fair News, or whatever you call that publi-
cation—you considered that to fit into the solicitation
rogram of Railway Express Agency?

Examiner Funk: You may ask him if he considered t, but don't word it so as to put words in his mouth.

Mr. Long: The workings of a man's mind certainly ouldn't be considered as proper evidence.

A. That was simply put in there to know which depart-ent to call.

Mr. Morgan: That is all.

y Mr. Long:

Q. I understood you to say that the route agent, when e called at your place of business, told you that you were oing a good job. Is that right?

A. That is right.

Q. And he did that each time he called?

A. Yes, sir.

Q. And he called on you, we'll say, once or twice a year?

A. He used to be more regular. Now, it is once or wice a year.

Mr. Long: That's all.

* * * * *

MR. L. C. JORDAN, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows.

Direct Examination by Mr. Long.

Q. Mr. Jordan, will you give your full name and address?

A. L. C. Jordan, Fremont, Michigan.

Q. Now, what is the occasion of your being here?

A. Well, I had to be in town on some other business, I received notice of this hearing, I wanted to enlighten myself about it.

Q. The Express Agency hadn't requested you to be here?

A. No, sir.

1468 Q. And did the Express Agency know that you were going to be here?

Examiner Funk: Just a minute. Is this gentleman a witness of the Express Agency?

Mr. Long: Well, I'm calling him. I saw him this noon, and he told me he'd testify, and I'm willing to consider him as a witness of the Express Agency. I didn't know whether he had voluntarily come here to testify or not, or whether he just sits here and listens, so I asked him to testify.

Q. Did you notify your route agent or any other individual connected with Railway Express Agency that you were coming to Chicago today?

A. No, sir.

Q. And in your absence from your express agency, who is supervising the work?

A. My son and daughter.

Q. Now, does Express Agency know that your son and daughter are taking care of the work in your absence?

. Yes, I think they do.

. Just how do they know, Mr. Jordan?

. Because they take care of the work ninety-five per of the time.

. Oh, I see. In other words, they really do the physi-work that is required in connection with the Railway ress Agency at your agency?

. Yes, sir.

. And where is that, again?

. Fremont, Michigan.

xaminer Funk: How large a town is Fremont?

itness: 3,500.

. Now, how long have you been agent at Fremont, igan?

. In October, it will be 25 years.

What is the business which you handle at Fremont?

. We have a contract with International Harvester pany, and we handle various appliances. We also have anch office of the Secretary of State, for issuing car licenses.

Q. What is the approximate amount you have invested in your business?

. $100,000.

How many employees do you have working in that ness?

. Four.

. That is besides yourself?

. Besides myself and family, a total of ten.

. Are the rest of this ten, members of your family?

. Yes, sir.

xaminer Funk: Are they adults?

itness: Yes, sir.

. The entire ten are members of your family?

. No, sir. Four. Six are members of the family, and have four men.

Q. Oh, I see. Those six who are members of the family—who are they? Yourself, your wife, your daughter, your son, and who else?

A. I have two sons who are in business with me, and two of the daughters work in the office. I have one younger son.

Q. I see. How many trucks are used in the operation of your business?

A. Three.

Q. Do you perform a pickup and delivery service of express shipments?

A. Yes, sir.

Q. And how many of those three vehicles are used in that service?

A. Mainly, one.

Q. And what signs, if any, have you on those vehicles, or on that one vehicle?

A. We have our own business sign on all of the vehicles. The one that we use mainly for pickup and delivery service of express has a sign of the Express Company on each side.

Q. Now, who pays for the license for the operation of that vehicle?

A. We do.

Q. And who pays for the gas and oil in the operation of that vehicle, insofar as it is used for the pickup and delivery of express?

A. We do.

1470 Q. And who pays for the insurance on that vehicle?

A. We do.

Q. Who pays for the garaging of that vehicle?

A. We do.

Q. Who drives that vehicle in the operation of the pickup and delivery service?

A. One of the sons takes care of it mainly, although others might help in his absence.

Q. These others you have reference to might be your ur employees in addition to the members of your family?

A. Well, two of the other employees.

Q. They all work interchangeably, do they?—Pitch in d do any kind of work that is ready to be performed ere, whether it is express or your other business?

A. Well, we have a department that each one is re-onsible for, but if they need help, we call on any of them.

Q. And who is in charge of your express department?

A. The office work, the older daughter; the delivery ork, the older son.

Q. I presume, then, that over each department in your siness is a member of your family.

A. That is right.

Q. And these four employees may be used interchange-ly in the performance of any work, including express ork, that is to be performed?

A. That is right.

Q. Now, do you own the premises in which is located e place where the express work is performed?

A. Yes, sir.

Q. And what is the average monthly gross income from xpress at that office, about?

A. At present, about $300 a month.

Q. And what percentage is that of your total gross from all of your business?

471 A. Oh, I'd say 10%.

Q. You have a telephone?

A. Yes, sir.

Q. And is that listed in the name of your business?

A. Yes, sir.

Q. And what is the name of your business?

A. We have a name that is recorded as a partnership.

Q. And what is that?

A. Jordan's.

Q. Who are the members of that partnership?

A. Myself and two sons.

Q. And is the revenue that is received from the operation of the express business placed with the revenue received from all of your business and thereafter divided among the three partners?

A. Yes, sir.

Q. Is the Express Agency also listed in the telephone—the place where you perform business at Fremont, Michigan?

A. No, sir.

Q. Who pays for the telephone there?

A. We do.

Q. Does the Express Agency have anything whatever to do with that?

A. No, sir.

Q. Does any representative of Express Agency ever call at your express agency at Fremont?

A. Yes, sir.

Q. And who are they?

A. The route agent mainly—Mr. Hoffman.

Q. And how often does he call?

A. Not very often.

Q. What does he say to you, and what do you say to him when he calls, if anything?

A. Occasionally there are a few questions about 1472 the handling of certain shipments that strayed, etc.

Q. That is about claims?

A. That is right.

Q. And anything else?

A. Other things that would be of general interest to the business.

Q. Does he audit your accounts?

A. Yes, sir.

Q. Now, do you or any members of your family who

in your business or any of your employees wear a
rm?

We wear our own uniform.

And that has Jordan's on it?

Yes, sir.

And do any of the members of your family who
in your business or any of your four employees wear
ge?

No, sir.

What are the hours during which your business is
?

Nine to six.

And did you consult the Express Agency as to the
during which your place of business was to be open?

No, sir.

During those hours, do you receive and deliver ex-
shipments?

Yes, sir.

Is your place of business ever open on Sunday?

No, sir.

Has any person in Fremont, Michigan ever re-
ted that you deliver a shipment to him on Sunday?

No, sir.

And does anybody ever call at your place of busi-
after six p. m. requesting delivery of a shipment?

At times.

And what, if anything, do you do on those occasions?

A. Deliver it.

Q. Well, now, have you consulted the Express
Agency as to whether it was proper for you to do
?

No, sir.

You have done that solely upon your own responsi-
y?

That is right.

Q. Well, now, do you ever have occasion to accept checks in payment of express charges at Fremont?

A. Yes, sir.

Q. And have you ever consulted the Express Agency as to whether or not that was proper for you to do?

A. No, sir.

Q. And have you accepted those checks upon your own responsibility?

A. Yes, sir.

Q. Were those checks drawn to the order of yourself, to the name of your business, or to Railway Express Agency?

A. To the name of Jordan's.

Q. Now, do you have a sign for your place of business reading "Railway Express"?

A. Yes, sir.

—Q. Did anybody tell you where to put that sign, or did you yourself determine where it was to be put?

A. I determined it.

Q. Did the Express Agency have anything to do with that?

A. No, sir.

Q. Approximately how much of the space of your place of business is occupied by the business conducted at your express agency?

A. We use a floor space of possibly 10 by 20 for the storage of the shipments, and also a portion of the office.

Q. Did Railway Express Agency have anything whatever to do with the selection of that part of your place of business where the express agency is handled?

A. No, sir.

1474 Q. Do you pay Social Security taxes on the salary paid your four employees?

A. Yes, sir.

Q. And that is predicated upon the entire salary that is paid to them by you?

Yes, sir.

Now, by Social Security I mean taxes under the
Security Act and not the Railroad Retirement Act.
e clear on that?

Yes, sir.

Now, has Railway Express Agency ever directed
to the manner in which your vehicles should be
?

No, sir.

Or as to the route that should be taken in delivering
nts or picking up shipments in Fremont?

No, sir.

Who determines that?

We determine that.

And has the Express Agency anything whatever to
h that?

No, sir.

Now, did the Express Agency have anything what-
do with the selection of the vehicle you use in pick-
delivery service now?

No, sir.

Does the Express Agency have anything to do with
t to the place where you buy your gasoline for the
ion of that truck?

No, sir.

Or does the Express Agency have anything to do
espect to repairs to that vehicle?

No, sir.

And does Express Agency have anything to do with
ace where those repairs are performed?

No, sir.

Q. Now, does Express Agency have anything to
lo with the decoration of your place of business where
he express business is carried on?—By decoration, I
painting, etc.

A. No, sir.

Q. That is determined by you alone?

A. Yes, sir.

Q. And is your entire place of business so decorated as to indicate that it is Jordan's business?

A. Yes, sir.

Q. Now I direct your attention to the paper-covered book entitled "Railway Express Agency, General Rules and Instructions," which is in evidence as Exhibit 8, introduced at the first hearing, and ask you if you have ever seen that.

A. Yes, sir.

Q. Are you acquainted with the General Rules and Instructions?

A. In general.

Q. Do you consider that the Express Agency has any right to direct you as to the appearance of yourself and your employees?

A. No, sir.

Q. So that if the Express Agency objected to the use by you of Jordan's uniforms, what would you do?

A. I wouldn't listen to them.

Examiner Funk: Do you use a special uniform for Jordan's?

Witness: Yes, sir.

Q. Do you use a telephone in your place of business for all of your business?—That sounds like a rather silly question, but maybe I should direct your attention to this. Rule 920, Exhibit 8, reads: "The telephone is furnished for the Company's business; employes should not be permitted to use it for personal matters except in case of emergency." Does that apply to your agency?

A. No, sir.

Q. You consider, then, that only those general rules and instructions in Exhibit 8 which are in the nature

specifications as to the work which is to be per-
ormed apply to you?

Yes, sir.

Now, what, if anything, has the Railway Express
ed your agency?

They furnished us with two scales and a safe.

And do they furnish you with the forms for waybills
livery sheets and some address tags and other forms
e Express Agency uses in its business?

Yes, sir.

Now, I presume you carry fire insurance on the build-
ere.

Yes, sir.

Does Express Agency have anything whatever to do
hat?

No, sir.

Do you carry workmen's compensation insurance?

Yes, sir.

And that covers all of your employees, does it not?

Yes, sir.

Does Express Agency have anything to do with that?

No, sir.

Does Express Agency make any contribution toward
emium on those compensation policies?

No, sir.

Do you meet any trains?

No, sir. We are served by truck.

miner Funk: Do you perform any pickup and deliv-
rvice?

ness: Yes, sir.

I think you said that a member of your family was
rge of the express department, and I don't recol-
ow just what member that was. Was that your
ter?

Well, there are two of them. The older daughter has charge of the office work, and the older son of the actual handling of shipments.

Q. And your daughter makes out all reports, does she? A. Yes, sir.

1477 Q. Do any of your other employees have anything to do with express work?

A. If they are needed to help out.

Q. But normally?

A. Normally the older son is in charge.

Q. Do you yourself perform any express work?

A. Very seldom.

Examiner Funk: Who signs the receipts and other forms?

Witness: Accepting shipments, you are referring to?

Examiner Funk: Yes.

Witness: Any one of the three boys, although the older son is delegated to take care of that.

Examiner Funk: Who signs the reports?

Witness: The older daughter.

Q. I show you Exhibit X-A, and ask you if that form is made out in your agency, if you know.

A. Yes, sir.

Q. It is. And your daughter makes that out, does she?

A. Yes, sir.

Q. And does she report any compensation paid to anybody there as wages or salary on that?

A. No, sir.

Q. I believe, according to our exhibit, there has been reported from your office as gross commissions for the period of 1943, '44 and '45, the sum of $5,558.04, and as net commissions, $3,994.85. Now, the difference between those two sums, I presume, is accounted for by the expenses of operating your agency. Is that right?

A. That is right.

Mr. Long: I have no further questions.

Examiner Funk: Mr. Hassenauer?

Mr. Hassenauer: No, Mr. Examiner.

Examiner Funk: Mr. Morgan?

1478 *Cross-Examination by Mr. Morgan.*

Q. Mr. Jordan, from the gross amount of business conducted there, I understood you to say it would approximate $300 a month. Was I correct about that?—Express business?

A. Yes, sir.

Q. Well, then, you carry on the general express business at Fremont, do you not? That is, all phases of it. You handle financial paper, receipt pickup and delivery, receipt for packages, prepaid shipments, make use of all forms that are used by the Express Agency in the conduct of its business. You perform all of that at Fremont. Is that correct?

A. Yes, sir.

Q. Such as handling money?

A. Yes, sir.

Q. Do you handle financial paper?

A. Yes, sir.

Q. The proceeds for all of that is taken into your account monthly?

A. Yes, sir.

Mr. Crawford: I have one or two questions I'd like to ask Mr. Jordan.

By Mr. Crawford:

Q. You signed, as I understand it, the same as the other witnesses here, an Application for Employment when you took over the express agency there. Is that right?

Mr. Long: If you remember.

A. I don't remember.

Q. In all that time, haven't you ever signed an Application for Employment with the Railway Express Agency?

A. In regard to getting a Social Security number?

Q. No. When you took over the agency there,

Mr. Crawford: Do we have one of those in exhibit?

1479 Mr. Long: Yes. This is Exhibit IX.

Examiner Funk: That is the form you said was in effect up to 1945?

Mr. Long: Right.

Examiner Funk: You will put in evidence the new form?

Mr. Long: Yes.

A. I don't remember signing that.

Q. In your work with the Railway Express Agency, you never signed an Application for Employment or any obligations to service?

Mr. Long: That is as far as you remember. —I don't know whether he has either.

By Examiner Funk:

Q. Did anyone working for you ever sign such form?

A. No, sir.

Q. How much time do your daughter and your son devote to express work? —I mean solely to express work.

A. Oh, the son, possibly, from one-half to three-fourths of the day, and the daughter, possibly, 25% of her time.

Q. And you, I believe, testified that you do very little of that work yourself.

A. That is right.

Q. How much money do you have invested in equipment which you use for express work solely?

A. Well, there is nothing that is used entirely for express work. All the office facilities, adding machines, etc., are used mainly for our other business, and also used for express work.

Q. And that same thing applies to the truck?

A. The truck possibly is used 75%—this one truck.

Q. For express?

A. Yes, sir.

By Mr. Crawford:

Q. Mr. Jordan, you do consider yourself to be
1480 obligated, however, to carry out the general rules and
instructions of the Railway Express Agency, do you
not—?

A. Yes, sir.

Q. —From time to time, as given to you. In other words, when you receive circular letters instructing you to do certain things in a certain manner, you carry out those instructions?

Mr. Long: Well, now, that question is rather broad, and I object.

Examiner Funk: You might ask whether he received such instructions.

Mr. Crawford: Well, I understood he testified he had.

Q. Have you from time to time received circular letters from the Express Agency containing instructions as to the methods of performing the work?

A. Yes, sir.

Examiner Funk: What was the nature of those instructions?

Witness: Along the line of packaging, how a shipment should be packaged.

Examiner Funk: Did you comply with these instructions?

Witness: We try to see that they are complied with.

Q. I believe you said, Mr. Jordan, that you didn't consider that if the Express Company gave you instructions as to your employee's appearance or your appearance, that you would carry out those instructions. Is that my understanding?

A. Yes.

Q. My understanding from your testimony was that if you received any instructions from the Railway Express Agency as to the matter of appearance of yourself, that you would not carry out those instructions, or you would not feel obligated to carry out those instructions. Is that right?

A. That would depend on what those instructions were.

Q. Well, assume that they gave you instructions
1481 that you should wear a badge. Would you carry out those instructions?

A. No, sir.

Q. You wouldn't carry them out?

A. No, sir.

Q. If they gave you instructions, we'll say, on Saturday, that they had noticed that a very important shipment was to be offered at your place on Sunday for receipt and asked you to be there to receipt for that, would you carry out those instructions?

A. No, sir.

Q. You would not carry out those instructions?

A. No, sir.

Q. I believe you said, though, at the start, that you considered yourself obligated to carry out the general rules and instructions of the company from time to time?

A. I said in general.

Q. Well, "and other instructions," I think you testified.

A. May I go a little further on that?

Examiner Funk: Yes.

A. To get this thing clear, we operate Jordan's, and anything that is in the interest of Jordan's is okay, but when it isn't, it doesn't function. We are mainly Jordan's. We handle express business as a side line.

Q. Any business that is connected with Jordan's, of course, I understand you retain the discretion to handle that any way you see fit. Is that correct?

A. Yes, sir.

Q. But anything pertaining to the Railway Express Agency, you consider you are obligated to carry out the nstructions of the Railway Express Agency. Isn't that orrect?

A. We will carry it out as far as we think it is to our nterest, when it doesn't interfere with our own business.

482 By Examiner Funk:

Q. Do you follow the General Rules and Instructions issued by the Express Agency?

A. Yes.

Q. Have any route agents at any time offered you any uggestions or at any time criticized your work?

A. No, sir.

Q. Who does the route agent deal with when he comes o your office? Does he deal with you or with your daugher?

A. Both. He talks to the son if I'm not there. It's all he same.

Q. How much of the time are you there, Mr. Jordan?

A. 90% of the time.

Q. So that normally you would know when the route gent is there?

A. Yes, I would normally know.

Examiner Funk: Any further questions, Mr. Long?

Mr. Long: Yes. I'd like to clarify this matter of genral rules and instructions.

Redirect Examination by Mr. Long.

Q. When you say, Mr. Jordan, that you comply with he General Rules and Instructions, do you mean by that hat you comply with the specifications in those as to the ork, and exclude from those any rules which apply to your personal appearance or the manner in which you comb your hair or the manner in which you pick up a shipment, or things like that?

A. That is right.

Q. Now, Mr. Jordan, when did you become express agent at Fremont?

A. October 1923.

Q. And have you been the merchant agent there since for Railway Express Agency?

A. Yes, sir.

Q. And have the conditions which you have described
1483 in your testimony obtained from the beginning
of your merchant agency in 1923 to the present date?

A. Yes, sir.

Q. Have the conditions been the same?

A. Yes, sir.

Mr. Long: That is all.

Examiner Funk: Mr. Hassenauer?—Mr. Morgan? If there are no further questions to be asked, Mr. Jordan may be excused.

Mr. Morgan: There is just one question I want to ask, about signing the reports. You said your daughter signs them, Mr. Jordan. Whose name does she sign?

Witness: My name.

Examiner Funk: If there are no further questions, the witness will be excused.

Mr. Long: Thank you, Mr. Jordan, for testifying.

(Mr. Jordan was dismissed.)

Examiner Funk: Mr. Burns has requested that he be called to the stand to clarify a statement which he previously made.

(Mr. Burns was recalled for further testimony.)

Witness: I previously made a statement my income from the Express Company was one-half. I was confused

it. In order to clarify that, my net income is around
,000.

Mr. Long:

. That is per year?

. Yes. I pay around $12,000 income tax from that.

xaminer Funk: Is it $30,000 from this business—

itness: And the express together. That is my busi-
s in general.

xaminer Funk: You include in that any personal in-
tments?

itness: That is everything.

. Now, that $30,000 net is from all your business, I
take it?

4 A. That is from everything I have in general.

Examiner Funk: Would that include such things
nterest on bank accounts?

itness: Everything I have.

. How much would you say your net income was from
r business, including express, aside from your invest-
ts?

xaminer Funk: That is A. H. Burns operating as a
pany.

. That is about all I can tell you. I make out an in-
e tax, and my net profits would be around $35,000.
e depreciation off, and it is down to about $30,000.

. That is your net profits from all of your interests?

xaminer Funk: He did testify, Mr. Long, it included
things as interest from a bank account.

. I don't have any bank account. I've got no interest
ing in. It is from my business in general. That is
t I wanted to clear up.

. Now, Mr. Burns, do you have any of your employees
any form when they come to you for employment?

xaminer Funk: Do they sign any form of application?

. Sometimes.

Q. Is that your personal form?

A. Yes, sir.

Q. It has nothing whatever to do with express?

A. No, sir.

Q. And that is the only kind of a form they might sign. Is that right?

A. Yes.

* * * * *

1534 MR. CHARLES D. SCHRIEBER, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Long.

Q. Mr. Schrieber, you are the merchant agent for Railway Express Agency at Tell City, Indiana, are you not?

A. I am.

Q. And for how long a time have you been agent for Railway Express Agency at that city?

A. Since 1920.

Q. What business or businesses do you operate in Tell City, Indiana?

A. A drug business.

Q. What is the approximate population of Tell City, Indiana?

A. About 6,000.

Q. And for how long a time have you been in the drug business in Tell City, Indiana?

A. Personally, since 1901. The store was established in 1865, during the Civil War.

Q. By your father, was it?

A. By my father, yes.

Q. And you have operated that store since 1901?

A. That is right.

Q. Is the Railway Express business that you handle in ll City, Indiana taken care of on the same premises in ich your drug business is operated?

A. Yes, sir.

Q. Has the Express Agency had anything whatever to do with determining the location in your place of business where the express business shall be concted?

A. No, sir.

Q. Has that been determined by yourself alone?

A. It has.

Q. How old are you, Mr. Schrieber?

A. Seventy-four.

Q. I believe you have a son who works in that business o?

A. That is right.

Q. But that agency has been continued in your name, believe.

A. That is right. Yes, sir.

Q. What is the approximate value of your business at ll City?

A. Do you mean the property?

Q. As a going business, I mean, including the property d everything that is connected with it, including the press.

A. $50,000.

Q. What is the basis of income you derive from the eration of the express business in Tell City, Indiana?

A. You mean what commission do I get?

Q. Yes.

A. 10%.

Q. And what does that cover?

A. It covers the entire operation of all the duties we erform.

Q. Do you perform the pickup and delivery service of express at Tell City?

A. No, sir.

Q. Do you know whether pickup and delivery service is performed in Tell City, of express?

A. It is.

Q. And do you know who performs that service?

A. Yes. Mr. James Bettag, B-e-t-t-a-g, a contract trucker.

(Discussion off the record, at Mr. Long's request.)

1536 Q. Does he pick up from your store any shipments which are left there by patrons for transportation?

A. Yes, sir.

Q. And does he leave at your store any shipments which he has been unable to deliver that may be called for by patrons?

A. He does.

Q. Now, how many employees have you in all of your business at Tell City?

A. Well, I have three regular clerks, one part time clerk, and my son and myself.

Q. Do those individuals, or any of them, ever work in the express business of your business?

A. Yes, they do.

Q. And who of them do work in the express business?

A. My son takes care of the major part of it, and we have a young man by the name of Fix, Ben Fix, who does quite a bit of it, and if we are all gone, we have a girl in there who is familiar with it and she handles shipments.

Examiner Funk: How do you spell that name?

Witness: F-i-x. Fix.

Q. Have you ever informed the Express Agency as to who among your employees works on express business?

A. Well, I am paying Railroad Retirement tax on my son.

And do you pay Railroad Retirement tax on any of employees other than your son?

. No, sir.

Then, outside of reporting the Railroad Retirement with respect to your son, I take it you have not notified Express Agency that any other employees work on ess business.

. That is right.

. Did you notify the Express Company as to who ld take care of your business while you were away efrom and here at Chicago at this hearing?

A. No, sir.

Q. You did not deem that necessary, I take it?

A. That is right.

. You considered that your business, I understand.

. That is right.

. Now, do you ever have occasion to accept checks n patrons who call at your business and pay trans- tation charges on express shipments?

. Every day.

. And do you do that on your own responsibility?

. I do that on my own responsibility.

. Have you ever consulted the Express Agency with ect to that?

. Never.

. Has the Express Agency anything whatever to do respect to that?

. We are authorized by the Express Company in one ance to accept checks, and that was General Electric.

. And are those checks which are received from Gen- Electric made out to the order of Railway Express?

. Yes, they are.

. And are the other checks that you have received le out to the order of Railway Express?

. No. They are made out to me personally.

Q. Do you or any of the individuals who handle any express in your place of business at Tell City wear a uniform?

A. No, they do not.

Q. Do any of such individuals wear a badge?

A. No.

Q. Now, do you have a telephone in your place of business?

A. I have.

Q. In what name is that telephone listed?

A. My individual name—C. D. Schrieber.

Q. Is Railway Express Agency listed in the telephone directory at Tell City?

A. It is not.

1538 Q. Now, who pays for the use of the telephone?

A. I do.

Q. Does the Express Agency have anything whatever to do with respect to that?

A. Not a thing.

Q. What, if anything, has Railway Express Agency furnished you for the conduct of the express business at Tell City?

A. Printed forms, sealing wax, glue, and one stamp—a metal stamp used on sealing for valuable packages.

Q. In the conduct of your express business, are you called upon to meet any trains?

A. No.

Q. I understand that your business is conducted solely through the truck driver who calls.

A. That is right.

Q. That is this man Bettag?

A. That is right.

Q. Did I ask you whether you own the premises where the business is conducted?

A. I don't think you have. I own them.

And does Railway Express pay any rental to you rom the commission which it pays you?

Not a thing.

In other words, your payment is exclusively on a ssion basis?

That is right.

Do you have any conversations with this man Bet-

Talk to him every day.

Does he tell you how to conduct your business?

No, sir.

Do you tell him how to conduct his business?

I have supervision in a sense over him, because he rings stuff to my place.

Q. Well, now, in what sense is that supervision?

A. Well, nothing any more than make suggestions, se he is an independent contract trucker.

What suggestions do you make to him?

Well, I might suggest to him that it is time to leave, is a little bit late to meet a train. I tell him to go ake a certain pickup.

Well, now, that pickup—would that be by reason of phone call that you had received?

That is right.

And you would advise him of that telephone call?

That is right.

Now, if he picked that shipment up, would he bring ou first before he took it away?

Yes, he would.

And would that be because of the fact that you keep a record of that shipment for your commission?

That is right.

In other words, your commission covers all ship- that are picked up or delivered in Tell City. Is that ?

A. In and outbound. Yes, sir.

Q. Do any other representatives of Railway Express Agency ever have occasion to call at your place of business at Tell City?

A. The route agent comes occasionally, perhaps once a year.

Q. And when he calls at your place of business, what does he says to you, and what do you say to him?

A. He comes in and says "Good morning." He says, "I came to check the books," and I get them out and put them down and he goes to work. Except for the passing of the time of day or something like that, there is nothing more said.

Q. Among the papers or forms, etc., tariffs, which have been furnished you, have you seen a paper-covered 1540 book entitled "Railway Express Agency, General Rules and Instructions," which is Exhibit 8 offered and accepted in evidence at the first hearing?

A. Yes.

Q. Have you read that book?

A. I have, a long time ago.

Examiner Funk: Are you familiar with its contents, Mr. Schrieber?

Witness: Fairly so, yes—as much as necessary for my business.

Q. I direct your attention to Rule 818 in the General Rules and Instructions, reading: "Employes must register their places of residence and telephone numbers at the office where employed or located, and report at once in writing any changes therein." Now, does that rule apply to your agency?

A. No, it doesn't. The driver has a telephone, of course, and I know his number, but he doesn't regularly report it to me. He expects me to look in the book if I want to call him, and get his number.

)o you have your employees who may at any time
express register their places of residence and tele-
umbers at your office?
don't have them register, but I know where they

But they are not required to register them at your
f business.
No.
So that if you were away and something happened
son, it might be that the employee who took care
usiness wouldn't know where some other employee
e.
They know where they are in a small town.
see. I direct your attention to Rule 798, which
"Agents must prepare proper notices covering
of regular employes in service, and also covering
in salary or position of employes, such notices to
arded to Superintendent for approval." Now, does
le apply to your agency?
No, it doesn't.
Do you consider that only those rules of the Gen-
al Rules and Instructions which are in the nature
specifications of the work apply to your agency?
A. That is right.

aminer Funk:

Do you understand what he means by the term
ications of work"?
Why, I think I do.
Would you, for the purposes of the record, state
nderstanding of the term?
Why, I think I do. Will that cover it?
I mean, will you make a statement as to what you
he term means—what he is referring to when he
specifications of work."

A. Specifications as to the work?

Q. Just as he used it.

A. Say that again.

Mr. Long: By "specifications," I mean, Mr. Schrieber, work such as making out the receipts on the forms furnished by the Express Agency. Now, you understand that you are required to make out receipts on forms furnished you by the Express Agency—

Mr. Crawford: Mr. Examiner, I don't want to get technical here, but I think the question was asked of this witness if he knew.

Examiner Funk: That is right.

Mr. Crawford: Now, as I get the explanation, Mr. Long is answering the question.

Examiner Funk: That is true, Mr. Long. The question to Mr. Schrieber was whether or not he understood. Mr. Schrieber made the statement, in answer to your question, that only the specifications in the General Rules and Instructions applied to him, and I merely asked him if he understood what you meant by the term "specifications." I think he should answer that.

Mr. Long: Well, I wanted to make clear to him what I had in mind when I used the word "specifications." I don't know whether he understood what I meant when I used the word "specifications."

1542 Examiner Funk: He stated only the specifications applied to his work, in answer to your question. He may not mean the same by the term "specifications" as used by you. Is that your understanding?

Mr. Long: Well, I don't know, frankly, and I wanted to make sure.

Examiner Funk: Well, I wanted to have him define the term.

Q. Mr. Schrieber, you have a copy of these General Rules and Instructions?

A. Yes.

Q. You say you read it some time ago and that you re familiar with its contents?

A. Sure. I read it at some time, yes.

Q. Do you consider that the rules and regulations set orth in that book are to govern you in the conduct of our work at the Express Agency?

A. Yes, sir.

Q. You do?

A. Yes.

Q. Do you believe that in the event a problem came up ith which you are not familiar, that you would go to that ook and find the answer to how you were to do the work?

A. That is right.

Mr. Long:

Q. Well, now, Mr. Schrieber, I just read to you one of he rules, and it is my recollection you testified that that articular rule would not apply to your agency. Is that ight?

A. Yes, sir.

Q. Then when you stated to the Examiner that the eneral rules and instructions in this book would apply to our office, did you mean that all of the rules would apply o your office?

A. I doubt that very much, because my clerks are not mployees of the Express Company.

Examiner Funk: Do you consider it would apply to you?

543 Witness: Yes.

Q. Do you consider that all of these rules would pply to you?

A. I doubt that very much, because I am not a— Well, don't remember everything that is in that book.

Mr. Long: Perhaps we ought to read some of these ules to the witness.

Mr. Morgan: Mr. Examiner, I want to understand just where we stand right now. The witness testified that he understood the General Rules and Instructions that were identified as Exhibit 8 in the first hearing—he answered that he did understand them, and then again he answered the Examiner's question that he understood that those rules were made applicable to him, and if there was any doubt about any operating condition in the conduct of the business, he would refer to those General Rules and Instructions.

Examiner Funk: That is correct.

Mr. Morgan: Now, Mr. Examiner, that Exhibit 8 shows—

Mr. Long: Have you an objection to make, Mr. Morgan, or—

Mr. Morgan: Yes, I am objecting.

Mr. Long: All right. Does your objection go to a specific question that has been asked?

Mr. Morgan: It goes to a specific question of the counsel's urging, Mr. Examiner, of wanting to read certain rules in the book of rules in Exhibit 8 constituting 1,155 rules, and I am presuming, if I may, that Mr. Long now expects to read Rule X, for example, and ask this witness does that particular rule apply to him, and that is the basis of my objection. I don't think the counsel should be allowed to ask questions of that character when the witness has already testified that he did understand these General Rules and Instructions were applicable to him and that he understood generally how those rules applied and if there was any doubt in his mind, he would resort to the book—Exhibit 8

Mr. Long: Well, the witness has also testified that
1544 some of these rules would not apply to him. Certainly, anybody would consult the specifications of the work that he has to do, and the specifications are in

here, a part of them are. For instance, sealing a money bag is an important specification, as testified by Mr. Harrison yesterday. I believe that is in here, but certainly this would not apply to this witness—all of these rules under the heading "Duties in Connection With Pickup and Delivery."

Examiner Funk: I think, Mr. Long, it is reasonable to assume that the question of rules and regulations applying to the actual pickup and delivery might not apply to this particular witness, except insofar as perhaps he may have contact with the man who performs the pickup and delivery. I believe he testified that he does receive calls and does tell him to get started sometimes when he is a little late. The question was asked him whether or not he followed all of the General Rules and Instructions with regard to his work. I believe he testified to that, and I don't see any particular need to question him with regard to each of those.

Mr. Long: I'd like to put to the witness this question, if I may, and I'd like a ruling on it.

Examiner Funk: You may.

By Mr. Long:

Q. I direct your attention, Mr. Schrieber, to Page 56 of the General Rules and Instructions covering Rules 827 through 834, entitled "Personal Conduct of Employes," and ask you whether those rules apply to your agency. Rule 827 reads: "The personal conduct and deportment of employes must be such as to reflect credit upon themselves and on the Company, and their personal appearance should be neat, clean and orderly. When on duty they should wear such uniform as may be required." Now, do you consider that anybody connected with the Express Agency may direct you as to what shall be worn by your employees or the manner in which the comb their hair, etc.?

1545 A. No, sir.

Q. Well, now, do you consider that any of these rules covering "Personal Conduct of Employes" applies to your employees? Will you answer that, please?

A. No, sir.

Q. Do you consider that any of those rules apply to you, as an employee?

A. No.

Q. Does anybody connected with the Express Agency ever advise you as to how you should decorate your place of business, particularly that part of your business in which the express is conducted?

A. No, sir.

Q. Do you consider that the Express Agency has a right to direct you as to the manner in which your premises are decorated?

A. No, sir.

Q. Now, when customers call at your place of business, do you yourself determine who among them shall be served first?

A. Yes.

Q. Does Express Agency have anything whatever to do with that?

A. No, sir.

Q. So that if there were in your store three customers, one of whom wanted express service and the other two of whom wanted service with respect to the sale of drugs, who would decide who among those three would be served first?

A. I would.

Q. Would the Express Agency have anything whatever to do with respect to that?

A. No, sir.

Q. What is the average gross monthly income from your express business at Tell City?

A. Do you mean by that just for the transportation, or lso for money orders we write?

Q. Money orders and also express business that you handle there.

546 A. May I refer to my books on that?

Q. Certainly. Have you brought your books with ou?

A. I have.—What I have here relates only to the comissions that I have received. I don't have any balance eet with me which would show the amount of business e do per month, but it would run between $6,000 and 10,000 per month.

Q. What I am interested in is the amount of your comissions, your gross commissions, not the express charges -just your commissions.

A. That is when? Any particular time?

Q. Well, say the month of June Do you have the onth of June 1948?

A. June 1948, $459.46.

Q. And the month of May?

A. The month of May was $345.82.

Q. And the month of April?

A. $283.72.—That is without the money orders.

Q. Yes. Now, have you a record of the money orders ere?

A. Yes. In April, my commission was $17.29 on money rders; in May, $15.58; and in June it was $16.39.

Examiner Funk: These are gross commissions, are ey not?

Mr. Long: Yes, they are gross commissions.

A. Did you want April, May and June in 1947?

Q. Yes.

A. In April, it was $255.73; in May, it was $267.22; in une, it was $216.72.—That is without the money orders.

Q. How much of your time per day on the average would you say that you personally spend in the transaction of express business?

A. I don't spend hardly any time. I delegate that to my son.

Q. Yes. And how many hours per day would you say that your son spends in the handling of express business?

A. Oh, five hours.

Q. And the balance on the drug business, I presume?

A. That is right.

1547 Q. Now, how many hours a day are you open for business?

A. Eight o'clock in the morning until eight at night.

Q. Are you open on Sunday?

A. Yes. We are open from eight to twelve, and from five to eight.

Q. Has anybody from the Express Agency advised you as to what hours you are supposed to work per day in express?

A. No, sir.

Q. Have you decided that on your own responsibility?

A. I have.

Q. Have you ever informed the Express Agency as to what hours you open and what hours you close?

A. I have not.

Q. If an individual brings a shipment to your place of business on Sunday, do you accept it?

A. Yes, we do.

Q. You do accept it. Have you ever consulted the Express Agency as to that?

A. No, sir.

Q. You have done that on your own responsibility?

A. Yes, so long as it isn't perishable.

Q. And the reason for your refusal to accept a perishable shipment on a Sunday?

A. Because we couldn't move it out until Monday.

Now, do you ever do any advertising in Tell City?

Yes.

And what has been the nature of that advertising?

Almost exclusively drug store advertising. Occa-
ally we slip in a Railway Express Agency ad.

Now, when you have slipped in a Railway Express
ncy ad, have you consulted anybody connected with
Express Agency with respect to that?

A. No, sir.

Q. And who has paid for that advertising?

A. I pay for it.

Has Express Agency made any contribution toward
outside of these commissions that are paid you?

None whatever.

Now, in addition to your advertising, have you done
solicitation of express business?

Personally, yes. I ask for express business of our
facturers.

And has that been done pursuant to any instructions
rections from Railway Express Agency?

It has.

And what has been the nature of that?

The nature of what?

Of the instructions from the Express Agency.

I said I didn't have any.

I see. You have done that upon your own responsi-
?

Yes, sir.

And on your own time?

That is right.

. Long: That is all.

aminer Funk: Mr. Hassenauer.

Cross-Examination by Mr. Hassenauer.

Q. Mr. Schrieber, does the Express Agency supply you with any form upon which you can note any expense that you incur in handling of express, or do you just at the end of the month make out one common form?

A. I make out just one common form.

Q. Have you ever listed on that form any expense with respect to this advertising you speak of for Railway Express?

A. No.

Q. You have assumed that is your personal obligation?

1549 A. Yes, sir.

Q. You never sought reimbursement by the Express Agency for that item?

A. No, sir.

Q. You testified that your son spends approximately five hours per day in the handling of express.

A. Rather supervises it. We have an employee there, a man, who is also employed in the drug store. He is a drug clerk, but he makes out a lot of these waybills, and my son sees that that is properly taken care of.

Q. What railroad serves the town of Tell City, Indiana?

A. Southern Railway.

Q. They have a station there?

A. They do.

Q. They have a railroad agent employed at that station?

A. They do.

Q. Do you recall whether or not that railroad agent at any time ever handled express at that station?

A. He is handling it now.

Q. He is handling it now?

A. Yes, sir.

Q. And you are still handling it?

Yes, sir. I don't have anything to do with the South-
Railroad.

But the agent at this station is still handling express?

He handles express which originates on his own
, the Southern Railway. They don't run any passenger
s, just a little branch—nothing but freight.

I see. You say you have one employee who devotes
iderable of his time to handling express. Other than
son, how much time does this other employee spend
andling express?

Well, the two together, my son and he, my son look-
on and he doing the work, it is five hours they devote
.

Q. Between the two of them?

A. Yes.

Mr. Hassenauer: That is all.

xaminer Funk: Mr. Morgan.

Ir. Morgan:

You perform all of the business for the Agency at
City aside from the pickup and delivery service. Is
correct, Mr. Schrieber?

And except what the Southern Railway does.

What the Southern Railway does. You get a base
% co[illegible] the business that you handle?

Th[illegible]s. I don't know what he handles.

We[illegible]ng just about what you handle. And
perfor[illegible] the express business at that office aside
the pickup and delivery that is performed by this
James Bettag. Is that correct?

That is right.

Do you sell financial paper?

We sell money orders.

And you handle shipments going C. O. D.?

Yes, sir.

Q. And that is counted in the proceeds of your commission, isn't it?

A. Yes, sir.

Q. You said you paid Railroad Retirement tax on your son. Do you pay a tax on yourself?

A. Oh, yes.

Q. Where does the driver get his instructions or advice in respect to making pickups?

A. Well, his original instructions came out of the Louisville office, and he adheres to those, I presume.

Q. Well, how often does he get them from the Louisville office?

A. Well, I don't know. That is his business.

Q. Well, suppose a shipper that just moved into the
city yesterday, wanted to ship an express package to-
1551 day. Where would he call to get that express shipped?

A. In a small town like ours, everybody knows where the express office is. He'd call me.

Q. He'd call you?

A. Yes, sir.

Q. Then where would the driver come—Mr. Bettag?

A. I would write that down on a book I have on my desk, and he would come in and look at it and he'd go and get the shipment.

Q. Then he would get his advice with respect to picking up that shipment from the call book in your office?

A. As to where the shipment is, where it should be picked up, yes, sir.

Q. Then of course the Louisville office would have nothing whatever to do with that?

A. Well, not with that shipment, no, but he gets his instructions—

Q. That is all I asked you, Mr. Schrieber, that one shipment.

A. I beg your pardon.

You say that you would write it down on the book. s one of the forms that is furnished you by the Ex- Agency?

No, sir—just a scratch book that we have.

But the scratch book is kept and he looks to that h book for his conduct as to where to pick up and r?

That is right.

Now, in the event of a shipment of money, who would

We don't handle money.

You don't handle money. How about a valuable ent?

Yes, we handle valuable shipments.

What kind of a form does he use there, and what do you give him?

Well, when you say a valuable shipment, if he comes h a shipment of household goods or a trunk or some- that is valued at $100 or $150, would you consider valuable shipment?

What would you say according to your instructions? ist asking about valuable shipments, how they are andled.

A. He doesn't give any receipt for them. He brings them to the office, and the person comes and heir receipt.

Long: Now, I object to the question unless Mr. an specifies what he means by a valuable shipment.

miner Funk: Yes, Mr. Morgan. Specify what you so that Mr. Schrieber can answer correctly.

How about a jewelry package—a watch?

Long: Of what value, Mr. Morgan, please?

Of $100 value—over $50.

Shipments like that from the jewelry store, they them in personally and they stand right there while e them a receipt, then they go on.

Examiner Funk: Those shipments are not handled by the pickup and delivery man?

Witness: Not small packages like that.

Q. What do you do with the money you collect yourself, Mr. Schrieber?

A. I make a remittance every day, and I place the cash in envelopes, seal it up, give it to the driver, he takes it to Cannelton, Indiana—

Mr. Long: I have a copy of the contract here. I'd like to introduce that in evidence. I just got it in this morning's mail.

(Copy of a contract dated at Tell City, Indiana, August 6, 1931, between Railway Express Agency, Incorporated, and James Bettag, was received in evidence and marked Exhibit XI.)

Q. Is that an express form you use in that transaction, Mr. Schrieber?

A. In what transaction?

Q. The handling of that money shipment—the value shipment. Now, where do you get instructions with respect to that?

A. We have a register of shipments I write up and he signs.

Q. And is that an Express Agency form?

A. Yes, sir.

Q. Furnished you by the Express Agency?

A. Yes, sir.

Q. And that transaction is handled according to your instructions?

1553 A. Yes, sir.

Q. How did you come to be here, Mr. Schrieber, at this hearing?

A. At this hearing?

Q. Yes.

A. Someone from Mr. West's office, the superintendent

isville, called me over the phone, and asked me
r I could be in Chicago on Monday morning, I be-
was, in order to attend this hearing. I told him
.

That is Mr. John West, superintendant of Railway
s Agency at Louisville, who called you –

Someone out of that office called me. Who it was,
know.

And asked you to be in Chicago on Monday of this

That is right.

That is one day before the hearing started.

He called me on Saturday.

Last Saturday?

Yes. He called me on Saturday, I believe, and I
on Sunday, to be here Monday morning.

Did you tell a representative in Mr. West's office
u would be coming up to Chicago to be present at
aring?

Yes.

Then the Express Agency was aware that you were
o be away from Tell City?

That is right.

Do you have any claims that ever arise in the hand-
the business down at Tell City?

Yes.

How do you handle them, Mr. Schrieber?

I make out the claim papers myself.

Those claim papers are regular Express Agency

Yes, sir.

Where do they go, those reports—to Chattanooga or
Chicago?

A. They go to Atlanta, Georgia, and the Southern
oute.

Examiner Funk: To whom are those reports sent, Mr. Schrieber?

Witness: To the claim agent at Atlanta, Georgia. His name is Beine, B-e-i-n-e, I believe.

Q. The driver, Mr. Bettag, sometimes makes collections of charges, does he, on shipments that are inbound?

A. Charges? Yes—for the General Electric Company.

Q. Yes. And who does he settle those charges with when he collects them?

A. He doesn't collect them. He presents them with a bill, the bill is sent to Owensboro, Kentucky, and they send me a check.

Q. I asked you, does he ever make any collections on shipments that are inbound collect?

A. Oh, yes.

Q. And who does he settle those charges with?

A. With me.

Q. And you handle those charges properly with the Express Agency in turn, don't you?

A. Yes, sir.

Q. And why do you do that? I mean, how does it come about you make those settlements with the Express Agency for charges that are collect? Do you do that on instructions?

A. Yes. I've got to send the money somewhere.

Q. I mean, you just don't do it on your own. You do it to comply with some instructions, don't you?

A. Naturally, yes, sir.

Q. Thank you. You spoke about a perishable shipment not being received on Sunday. I take it then that you are familiar with the train schedules operating through Tell City.

A. We don't have anything to do with the trains in Tell City.

Q. No, but do you know when they arrive and depart, pretty generally?

n Tell City?

Q. Yes.

A. Don't know a thing about them. Our business all done with the L, H & St. L.

Vhat is that—an electric line?

No, sir.

s it a railroad?

Yes, sir.

You don't know when the train leaves your town en it arrives in town?

Oh, yes.

Well, that is what I asked you, Mr. Schrieber.

Well, it doesn't come in on the Southern Road.

Well, on any railroad. You name your railroad. I as familiar with your little city as you are, Mr. er.

t is rather confusing.

Well. I want to be helpful, and if I confused you I get it straightened out.

* * * *

Schrieber, I wanted to know the vehicle that is used lling the business. If it is an electric line, tell me it lectric line; if it is a steam railroad, or if it is a ger train, or if it is a freight train, tell me about Now, are you familiar with when they arrive in your

They don't arrive in our city.

Well, do they pass through there?

They don't pass through there.

* * * *

You tell me about that, will you, Mr. Schrieber? what I want to know.

A. All right. A truck driver comes to our store in e morning. He picks up whatever shipments we have there. It goes on to Cannelton, Indiana, which is three miles up the line.

Q. So as to make what train?

A. He picks up the shipment and crosses the river and goes over to Hawesville, Kentucky, he goes to the L, H & St. L depot there, and he meets the train there that leaves at approximately nine o'clock.

Q. That is A. M.

A. In the morning.

Q. Yes.

A. Then he picks up what stuff over there is there, and then he comes back again and he gets back in our town eleven o'clock—that's the old time—and then he leaves again at four o'clock and makes the same trip over again.

Q. For what purpose?

A. Picking up and making deliveries of freight.

Q. To make connection with a train?

A. That is right.

Q. Then you are familiar with those train schedules through that town, aren't you?

A. Oh, yes. I've got a schedule right next to the telephone. They are right to the minute.

Q. Well, thank you, sir. I was interested in knowing how well you were acquainted with the train schedules. You seem to be quite well conversant with that.

Mr. Long: He has been there a long time. I think he should.

Q. On the question of soliciting business, does the driver solicit any business? Do you ask him to solicit any business of any kind, Mr. Schrieber?

A. Yes, I request him to do that, but he is very negligent about it. He doesn't solicit enough to suit me.

Q. Now, you solicit business yourself, don't you?

A. Yes, I do.

1557 Q. Does that come about from any circulars or instructions you get from Railway Express Agency encouraging you to solicit business?

A. It is just a natural desire I have to make a little more money, because the more business I do, the more commission I get.

Q. Do you ever get any circulars in respect to that phase of the business?

A. I imagine I have in my day.

Q. I am not so sure that I understand your explanation about the Southern Railway agent, Mr. Schrieber. I want you to enlighten me about that. In your brief testimony, you didn't make it quite clear to me. Will you tell us the connections the Southern Railway agent has?

A. Yes, sir.

Q. Tell us over again, will you?

A. ~~All right~~. The branch line of the Southern Railway runs into Tell City, a little branch about twenty-five miles long. There is an agent there at the depot. Only freight trains run on this branch, but they will accept express shipments.

Q. At what town does it branch off, Mr. Schrieber? What is the name of that little town where the branch starts off?

A. Lincoln City, Indiana, and he goes to Cannelton, Indiana. He will accept express shipments if they are offered to him—the agent at Tell City will accept them if they are offered to him—but the public knows that there is no service there, and we have good service, and they bring express shipments to us and we give them prompt service. Now, when he makes out his report at the end of the month as to the amount of money he has collected for both in and out express shipments, he gives me a report of that at the end of the month and I include that in the report that I make out for the truck driver so that he can get his 5% commission on that that the Express Company pays him, which he is entitled to.

Q. Do you make any report of that on your report, then, in turn?

A. No, not that part of it. I make out the truck driver's report for him because he is—I won't say incapable.

1558 Q. When you say the truck driver, you are talking about Mr. Bettag?

A. Yes. I won't say he is entirely incapable. It would be an awful job for him to get up this monthly report, so in the goodness of my heart I make it out for him. He goes to Southern Railway Company, brings me a little slip of paper of what the man did there and I include that in his report so he gets 5% commission on that, because he also serves the Southern Railroad.

Q. He goes out and makes a pickup of a shipment, and instead of bringing it to your place of business he takes it to the railroad agent?

A. No, he never takes anything to him. He brings it all to our place.

Q. What the Southern Railroad gets, then, is business where shippers come in at the station direct?

A. That is right.

Q. And then that agent makes an accounting to you as to the amount of charges he collects?

A. Only for the purpose of figuring the amount that would be paid to the truck driver for having handled that business, because he gets 5% of the gross amount of business that our office does and that the Southern Railroad Company does.

Q. In other words, Mr. Bettag gets his earnings from all of the business conducted at Tell City.

A. That is right.

Q. Whether it is handled by you or handled by the railroad agent.

A. That is correct.—May I qualify my statement along there. In one sense of the word, I have no business making out this man's report. That is his business.

Q. I understood your testimony on that.

A. You understand, I only do it to be helpful.

Q. You said you did it voluntarily and to be helpful to him because you knew the boy—

A. He is an independent trucker, it is his own business, and it is just to help him along.

1559 Q. But you did say you told him to step on it sometimes to make that train, or matters of that kind.

A. When he leaves our office, yes.

Q. Was there ever an express office there at Tell City? —An independent express office on a salary basis or any other basis other than since you have handled it?

A. No.

Q. You have been handling it ever since 1902. I believe you said.

A. No. I think, 1920.

Q. 1920. But you said something about 1902.

Mr. Long: I think he said his dad had a drug store there in 1902.

Witness: That is right. I said I went into the drug business in 1901. I said the store had been established in 1865, during the Civil War, but personally I went in it in 1901.

Q. Who handled the business as you are handling it now before 1920?

A. The Southern Railway.

Q. The Southern Railway agent handled it?

A. The Southern Railway agent, yes, sir.

Q. You will please not regard this as in any way personal, Mr. Schrieber, but suppose you were a drinking man and drank to excess, or that your son who handles the business drank to excess, and you got on a protracted drunk. Let's call a spade a spade. You got on a protracted drunk and stayed on there for three weeks. What would happen to that office, if you know? Could you do that independently, if you were so of a mind?

A. If I were to get on a spree for three months?

Q. Yes.

A. Business would go on just the same.

Q. And you wouldn't be likely to lose the office?

A. No, sir.

Q. The Express Agency wouldn't register any objections about it?

A. No. —They'd never know anything about it if
1560 I got drunk for three weeks. My boy would take care of that.

Q. What if he was drunk with you? If you were on a spree together.

Mr. Long: Do you want all of his employees drunk?

Mr. Morgan: No. I just want to stay with this.

A. It still would be taken care of, because the boy who works in the drug store knows all about the express business too.

Q. So the Express Agency wouldn't offer any objections, or if they did, you wouldn't pay any attention to them.

A. No, sir. I don't believe I would. If I wanted to get drunk, that's my own business.

Mr. Morgan: That is all, Mr. Schrieber.

By Mr. Hassenauer:

Q. Mr. Schrieber, I'd like to get myself cleared on the activities of this agent employed by the Southern Railroad Company at the station in Tell City. You say that he gives the driver a report which you include in your report to Railway Express Agency.

A. He doesn't give me a report. He just writes it on a little slip of paper, what business he did, and I include that in the report I make out for the driver so he can get his 5% commission.

Q. Do you know whether or not the agent at Tell City makes out a form reporting to the Express Agency the amount of business that he did at that station?

A. I don't know a thing about it.

Q. You don't know what commissions he receives?

A. I don't know anything about it.

Q. But you do know that he handles express.

A. Yes, sir.

Q. And the only information he gives you is that contained on a small slip of paper, so that you can inform the driver what commission he is getting on shipments that he had picked up at that station.

A. Well, that is not put right either. He gives 1561 me that slip of paper and when I make out the driver's report I include that in the driver's report so he can get his money for the in— and outgoing express shipments that the Southern depot has handled.

Examiner Funk: Mr. Schrieber, does the agent of the Southern Railway Company or the pickup and delivery man give you the slip of paper?

Witness: It is given to the pickup and delivery man to bring to me by the agent.

Q. Do you know the name of the agent for the Southern Railroad at that point?

A. Yes.

Q. What is his name?

A. Riley, R-i-l-e-y. Agent Riley.

• • • • •

Q. Now, you don't belong to any labor organization, do you?

1562 A. No, sir.

Q. Do you belong to any group that have entered into a collective bargaining agreement with Railway Express Agency concerning the performance of your duties?

A. No, sir.

Q. You know what I mean by a collective bargaining agreement?

A. Yes, sir.

Mr. Hassenauer: That is all.

Mr. Crawford: Mr. Examiner, I have a couple of questions I wanted to ask and clear up a couple of points.

By Mr. Crawford:

Q. I might be rather repetitious of what has been said, but the final questions I have here are with reference to your instructions. Now, you consider yourself as the official representative of the Railway Express Agency in your community, do you not?

A. Yes, sir—one of them.

Q. Now, with reference to your duties as express agent, do you get all your instructions as to the means, methods and details of your work from the Railway Express Agency?

A. Yes.

Q. And you also receive, do you not from time to time, circular letters of instructions?

A. Yes, sir.

Q. And you carry those out when they are applicable to the particular work you are doing? By that, I mean Mr. Long pointed out that the rules and regulations where you would not perform a certain kind of service like pick-up and delivery —of course, it would be obvious these rules would not apply that had to do with that particular line. But you testified that in all those duties that you do perform, that all the rules that are applicable to that particular line of work you do follow.

1563 A. Yes.

Q. By the way, do you take in collections?

A. Yes, sir.

Q. Of course, that is part of your work. Then you would follow the rules, of course, in the general regula-

ns and instructions and in the instructions you would
eive from time to time with reference to the method of
lecting, etc. You would follow those instructions?

A. Yes, sir.

Q. Now, you stated, I believe, in your testimony that
receiving collections, etc., you take checks.

A. Yes, sir.

Q. I believe in substance you said—at least it was in-
red from Mr. Long's inquiry on that point—that you
ln't consider it any of the company's business how
n handled those collections of checks, etc.

A. Yes, sir.

Q. Well, now, having testified that you follow the rules
en to you by the company with reference to the work
t is applicable to your work, and the collections are a
rt of your work, I call your attention to Rule 850, 851,
) and (b), 852 and 853. Now, that has to do with the
thod of collecting by check where there are directly
horized local agency bank accounts, and at points where
re is no local agency bank account in operation. There
two different methods which your rules tell you to
low. Then Rule 852 and 853 have application to the
lection of C.O.D.'s. Now, you do consider those rules
l follow those rules, do you not?

A. As far as it is humanly possible to do so. There
't anybody can go out and do business today without
epting a check occasionally.

Q. But you wouldn't consider, then, when you collect
Express Company shipments, that it wasn't any of
Express Company's business, would you?

A. Well, not in that sense.

Q. Now, let's get over to where it says "Personal
4 Conduct," where you stated, I believe, it didn't have
any application to you. I think Mr. Long pointed out
les 827 down to 829. Let's take Rule 827. It says:

"The personal conduct and deportment of employes must be such as to reflect credit upon themselves and on the Company." Now, you would consider that that rule would be applicable to you as agent, would you not?

A. Yes.

Q. And down at the bottom of Rule 829, it says: "Polite and courteous treatment must be accorded to all, whoever they are, or however unimportant their business may appear." You would consider that as applicable.

A. Yes.

Q. Now, when you receive these instructions, particularly these circular letters, etc., you understand that to be, do you not, the purpose of giving you those circular letters and instructions is to supervise and guide you in the means and methods and details of your work as an agent?

A. Yes, sir.

Mr. Crawford: That is all, I believe.

By Mr. Morgan:

Q. Instead of just giving us those initials, what is the name of that railroad, Mr. Schrieber?

A. That we do business with?

Q. Yes.

A. Louisville, Henderson & St. Louis—a branch of the L & N.

Mr. Morgan: No further questions.

Examiner Funk: Mr. Long?

Mr. Long: Yes, I have a few questions.

Redirect Examination by Mr. Long.

Q. Mr. Schrieber, Mr. Crawford has read to you 1565 some of the rules applying to the personal conduct of employees, specifically the rule relating to polite and courteous treatment of patrons. I presume you apply

t same rule to patrons who come into your store to buy
gs, do you not?

A. Yes.

Q. And you consider that rule a good rule to apply to
ur own business?

A. Yes, sir.

Q. And that is the reason why you do apply it to your
n business and not necessarily because Express Agency
s told you so?

A. That is right.

Q. Well, now, with respect to these checks, do I under-
and you correctly that you accept checks in payment of
press charges drawn to your order?

A. Yes, sir.

Q. And not to the order of Railway Express Agency?

A. That is right.

Q. And you deposit those checks in your own bank
count, do you?

A. Yes, sir.

Q. Now, you have how many employees in your busi-
ss there besides your son?

A. We have three regular, one part time.

Q. And one of those, you say, does considerable of
press work?

A. Yes.

Q. Well, now, when you employed him, did you consult
e Express Agency?

A. No, sir.

Q. And did you ever consult the Express Agency when
u hire or discharge any employee whose duties include
ork with respect to express?

A. No, sir.

Q. Do you require any of your applicants for employ-
ent to fill out an employment blank of any kind?

A. No, sir.

Q. And have you ever required any person coming
1566 in your employ who was to work on express work to fill out an application for employment of any kind?

A. No, sir.

Q. Now, what is the percentage of your express commissions to your gross income in the operation of all your business, per month?

A. I might be able to give it to you per year.

Q. Per year will be satisfactory.

A. My fiscal year in the drug business ends June 30th. In the drug store, I did in 1947, $90,000 worth of business, and my commission in that length of time with the Express Company was $4,034.39. Now, what is the percentage?

Q. That is a matter of computation. Now, something was said to you about your practice of telling the driver there to get a move on or something like that at times. You have an interest in serving the community with good express service there, have you not?

A. That is the only thing.

Q. Because that increases your commissions.

A. That is right.

By Examiner Funk:

Q. Mr. Schrieber, what would have been your net earnings from the drug store business during that year?

A. Between $6,000 and $7,000.

Q. And what would have been your net express earnings?

A. Well, that's practically it. The only expense I have is $40 a month I pay to my son out of that.

Q. I don't believe you understood me. I mean, from your drug business alone, outside of the express, what was your net earning, approximately?

A. Well, I still say between $6,000 and $7,000.

Q. And what would be your net earnings from the express work as distinguished from your drug store?

A. Well, I got this money from the Express Company. I have no other expense.

Ir. Long:

Your gross commissions from the Express Company $4,034.39.

Yes.

And from that, of course, would be some expense in se of the premises you have there, and electric lights telephone.

Well, I don't make a regular practice of charging up against the Express Company.

r. Long: I have no further questions.

Vhereupon a 15-minute recess was taken, from 11:30 to 11:45 a.m.)

xaminer Funk: I believe, Mr. Morgan, you had anr question to ask this gentleman.

Recross Examination by Mr. Morgan.

Mr. Schrieber, you say that the time consumed in handling of express business there at Tell City is roximately five hours a day?

. Yes.

. Now, suppose you were handling the express busi- and putting in the five hours yourself, personally, an eight-hour day basis, that would leave you three rs for the conduct of the wholesale drug business, ldn't it?

. Retail drug business.

• • • • •

Q. You do own the drug business?

A. Yes, sir.

Q. And tell me again, was the gross $90,000 for year 1947? Was that the year you gave?

. $90,000.

Q. For what period of time?

A. I believe that was for '47.

Mr. Long: I believe it was for '47.

Q. That's all right. I will accept the 1947. And the gross commissions from the express were what again?

A. A little over $4,000.

Q. And it took five hours to handle the express daily, as an average?

A. Practically so. Of course, sometimes it only takes an hour, and then again it takes all day.

Q. Well, you said an average, and that is all right.

A. Well, on an average, yes.

Mr. Morgan: That is all.

Mr. Long: I have one further question.

By Mr. Long:

Q. Mr. Schrieber, would you consider the rental of that portion of your place of business now used for the handling of express to the Express Agency for use by it in operating its business there by a regular salaried employee in the event the express business were taken away from you?

A. No, sir.

Mr. Long: That is all.

Examiner Funk: Mr. Schrieber, I have a few questions.

By Examiner Funk:

Q. I don't believe you stated the circumstances under which your express work began. Will you tell us about that?

A. Yes, I'll be glad to. I'll start right from scratch. I was standing out in front of the store one day—

1569 Q. When was this?—1920?

A. It must have been 1920. There were two gentlemen standing across the street and they were looking at the building. Finally they came over and they said

“Do you own this building?” I said yes. They
ced themselves. One of them said, “I’m the super-
nt of the American Express Company—”—no, what
called in those days?

ong: American Railway Express.

American Railway Express, and the other gentle-
troduced himself as the route agent. In the course
ersation, they said to me, “We are compelled to
he American Railway Express away from the South-
ilway depot, because the Southern Railway is in-
g its own express service, to be known as the
astern, and we have been ordered to vacate. Would
nsider being the agent for us in Tell City?” I said
n, “I might. Is it worthwhile?” They said, “We
t it would be.” I thought just a little bit longer,
said, “I’ll take it.” So they said okay, and they
the printed forms and the seal that I was talking
nd a can full of paste down to my place, and that’s
y brought, and we started in business. The route
I think, was there for two days, and then we were
own. That’s the highlights of it.

The route agent at that time instructed you as to
u were to do the work?

That is right.

That is the time when you were presented with a
f the General Rules and Instructions?

I don’t know whether I got it at that time or not,
some time they did bring down a book, come to
f it—tariffs. Naturally, that had to go with the
s.

Well, Mr. Schrieber, I don’t believe you have told
tly all of the reports which you yourself make to
press Agency with respect to your work. Just dis-
this pickup and delivery man’s report, and tell us
wn reports.

1570 A. I haven't made out a report for seven years. My son makes it out and turns it over to me to look at, and if I think it is all right I sign it.

Q. What is the nature of these reports made out by your son?

A. He makes out the 96-B.

Q. Form 96-B?

A. Yes.

Mr. Long: Is this a 96-B, Mr. Schrieber (handing a copy of the form to the witness)?

Witness: Yes.

Mr. Long: Do you want that in evidence?

Examiner Funk: Yes.

(A blank copy of Railway Express Agency Form 96-B, "Monthly Balance Sheet—Commission Office," was received in evidence and marked Exhibit No. XII.)

A. He makes that out and I look it over and sign it.

Q. Is that the only report you make to the Express Agency?

A. You mean the one for the driver?

Q. No. I mean this one (indicating Exhibit No. XII).

A. No. He makes out one or two others.

Q. Can you tell me what those are for?

A. That's the small sheet on account of the $40 involved that is due him out of the commission.

Mr. Long: I might say for the record the one form is 7050, such as Exhibit X, and the other is 7051.

* * * * *

Q. How often does your son submit these reports?

1571 A. Once a month.

Q. All three of them?

A. Yes, sir.

Q. Mr. Schrieber, do you have any funds invested in any equipment used by you in the performance of express work solely?

ny funds invested in equipment that I use?

s there any equipment you use in addition to what
ress Agency gives you, such as a desk or some-
at you use only for express?

es. We have scales we must have.

o you use that only for express, or is that also
r the drugs?

o, that is used around the store. And then we have
truck.

ave you ever applied for transportation?

ever have.

believe you testified that no one in your drug store
r signed an Express Agency form entitled "Ap-
n for Employment," and "Application for Fi-
Bond and Agreement as to Losses by Negligence
falcation." Did you sign such a form, Mr. Schrie-

ot that I can remember.

ave you ever entered into any written agreement
e Express Agency with respect to any part of your

Not that I can recall.

These individuals that assist you, your son or who-
se might assist you—they also assist you in the
nance of drug store work?

Yes, sir.

Are you the agent in Tell City for any other or-
ion or company?

No.

The drug store and the express business are the sum
your business enterprise?

Yes, sir.

Does the Express Agency know that your son per-
this work?

Yes, sir.

1572 Q. Have they ever made any remarks to you with regard to that?

A. No, sir.

Q. I believe you testified that the route agent comes in once in a while.

A. Right.

Q. Has he ever made any suggestions or offered any criticisms with regard to your work?

A. I think not.

Q. Has he ever advised you with particular reference to the General Rules and Instructions?—That you were to follow any particular rules and instructions?

A. Not that I can recall. He takes that for granted, I guess, that we more or less know them.

Q. When the route agent comes into your drug store, Mr. Schrieber, does he deal with you individually or does he deal with your son, or both?

A. Both.

Q. If you are not there, he deals with your son. Is that right?

A. Yes.

* * * * *

By Mr. Long:

Q. Something has been said about circular letters and bulletins which have been sent to you. Will you describe the nature of those—what they cover?

A. We will get circular letters which go out, I presume, to every office in Mr. West's district.

Q. Mr. West is your—

A. Superintendent at Louisville, Kentucky. This circular will say, "We are trying to trace such and such a shipment, which seems to have gone astray." It will also say, "The cold weather is coming on, and if you have any shipments that might be frozen in transit, be sure that

they are carefully packed." These instructions may
1573 say, "There is some counterfeit money afloat. Be
careful you don't take any of it in." It will give the
description of it. —Just general things like that.

Q. Such as embargoes, too, at times?

A. Yes, embargoes, and when there are washouts on the railroad and certain branches can't function, that is included in this letter, and just a general survey of the whole business.

Mr. Long: That is all I have.

By Examiner Funk:

Q. Mr. Schrieber, suppose you took some counterfeit money after receiving these instructions. Would that be your loss or the company's loss?

A. That would be my loss.

Q. You testified, I believe, that you do receive checks from the General Electric Company. You have been authorized to do that?

A. Yes, sir.

Q. Can you tell us a little bit about the circumstances surrounding that?

A. No, I can't tell you anything about it. I was authorized to accept checks.

Q. Did you receive a letter from the Express Agency with regard to that?

A. I think I did. It came propably from Mr. West I couldn't recall, it was so long ago.

Q. You just know you have been told that you can accept those checks at the Express Agency's responsibility.

A. Those are the only checks I have a legal right to accept. I'm responsible for the rest.

Mr. Long: And those checks from the General Electric are drawn to the order of Railway Express, and they are forwarded to Railway Express the same as cash. Is that right?

Witness: That is right.

• • • • •

1574 By Mr. Morgan:

Q. When these two gentlemen called on you—I should judge that would be in the early part of 1921, because the Southern took over May 1, 1921—well, whenever it was, did they tell you to put an American Railway sign on your building, that that would be the place at which express business would be conducted?

A. They didn't tell me to. There was a sign accompanied the things they brought down from the Southern Railway depot, though, and I set that in the window.

Examiner Funk: Is that sign still in your window, Mr. Schrieber?

Witness: Well, either that or a similar one. We have signs in the window.

• • • • •

1575 MR. CLARENCE M. WESTFALL, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows.

Direct Examination by Mr. Long.

Q. Mr. Westfall, could we have your full name?

A. Clarence M.

Q. Your full name is Clarence M. Westfall?

A. Right.

Q. And you are the merchant agent representing Express Agency at what point?

A. Newberry, Indiana.

Q. And how long have you represented the Express Agency at that point?

A. Since 1939.

Q. And what is your regular business there?

A. Drug store.

Q. That is operated in connection with your express agency, is it?

A. Right.

Q. And how long have you been operating a drug store at this point?

A. Eleven years.

Q. Now, how many employees do you have in your business, Mr. Westfall?

A. Well, I have three adults and four boys.

Q. Three adults and four boys?

A. Yes.

Q. Do all of those employees pitch in and help you with respect to all of your work, including express work?

A. Only the adults.

Q. Only the adults. That is three adults and yourself?

A. That is right.

1576 Q. You do some of the work too?

A. Oh, yes.

Q. Now, how many shipments do you average there a day?

A. Oh, about five average; some days it's more.

Q. And what is the basis for the payment to you for handling express as merchant agent?

A. A commission of 15%.

Q. What do your commissions run to per month?

A. Oh, $8 to $10 a month.

Q. Do you perform a pickup and delivery service?

A. No.

Q. Now, how long have you had in your employment these three adults?

A. Four years is the longest.

Q. Could you give us their names?

A. Mrs. Brown, Miss Purdue, P-u-r-d-u-e, and Mr. Lagrande, L-a-g-r-a-n-d-e.

Q. Mr. Lagrande takes care of the bulk of the physical work?

A. Yes. It is about thirty minutes at the most in the morning, and then he goes ahead and does his other work.

Q. What is his other work?

A. Making ice cream.

Q. Does he tend to customers that come in there with express shipments during the entire day?

A. Yes. If they bring one in, he takes care of it.

Q. Now, is the express business operated in a part of the building which houses your drug store?

A. No. It is a little room on the back end of the building.

Q. And what is that little room used for?

A. Nothing but express.

Q. How about the making of ice cream?

A. The express room is partitioned off, away from it.

Q. I see. Did you build that on your building yourself?

1577 A. Yes.

Q. Did you consult the Express Agency as to building that part of your place?

A. No.

Q. You took that upon your own responsibility?

A. Yes, sir.

Q. Now, do you store any drugs in that building?

A. No.

Q. Or anything else but express?

A. That is all.

Q. Now, did you consult the Express Agency when you employed Mr. Lagrande?

A. No.

Q. Did you advise the Express Agency that you had employed him?

A. No, sir.

Q. When was the first time that the Express Agency, it knew at all, knew that Mr. Lagrande was performing y work for the Express Agency?

A. Well, if they found it out, I didn't tell them.

Q. I see. So you don't know today whether the Express gency knows that?

A. No.

Q. Did you have any of these adults, including Mr. agrande, sign an application for employment blank when ey accepted employment in your service?

A. No, sir.

Q. Does Railway Express Agency pay you any rental addition to this 15% for the use of the premises used the operation of the express business?

A. No, sir.

Q. Has anybody connected with the Express Agency er advised you as to how your place of business which u use in the operation of express should be decorated painted?

A. No. In fact, I don't believe they ever noticed the om at all.

Q. I see. Do you have a sign reading Railway Express Agency?

78 A. Oh, yes.

Q. And where is that located?

A. Right above the door of the express office.

Q. Now, did anybody tell you where to place that sign?

A. No.

Q. Did you determine that yourself?

A. I did.

Q. Has anybody from the Express Agency ever called your office?

A. No one but the route man.

Q. And how often has he called?

A. Oh, once, twice a year.

Q. Do you recall when he last called?

A. No, I don't. He sent Mr. Sam Miller of Vincennes down the last time.

Examiner Funk: Who is Mr. Miller?

Witness: He is the agent at Vincennes.

Q. And what did Mr. Miller say to you at that time, and what did you say to him?

A. Well, in fact, when he came in, I didn't even know he was there. He was sitting at the desk taking care of the express business when I came in.

Q. That is, taking care of the accounts?

A. Yes—checking them.

Q. Checking the accounts.

A. Yes. When he gets through, he just tells me good bye.

Q. I see. And has that been generally the practice when the route agent calls at your place of business?

A. Yes.

Q. Now, have you been furnished with one of these paper-covered books entitled "Railway Express Agency, General Rules and Instructions"?

A. Yes, sir.

Q. And have you acquainted yourself with such general rules and instructions?

1579 A. No, not very thoroughly.

Q. Have you considered these rules entitled "Personal Conduct of Employes" which are rules 1827 through 1834, inclusive, as applicable to your agency? Those rules—well, the first one reads: "The personal conduct and deportment of employes must be such as to reflect credit upon themselves and on the Company, and their personal appearance should be neat, clean and orderly. When on duty they should wear such uniform as may be required."

A. The only thing they are required to do is to look neat, etc., according to my business. The express business is so small it don't amount to much.

You aim to look neat and tidy in the conduct of drug business.

Yes, sir.

I would presume that would be much more important conduct of a drug business than it would be in the ct of an express business.

Right. One takes care of both.

Now, do you ever have occasion to receive circulars ters or bulletins from the superintendent having juris- n over your territory?

Yes, sir.

And what is the nature of those circulars?

Oh, they are circulars on quarantine, embargoes and s like that.

Quarantines. What is that? Notice that you can't certain things into a certain territory?

That is right.

I see. Now, what time of day is your business open, hat time of day is your business closed?

Seven to nine.

That is seven in the morning to nine o'clock at night.

Yes, sir.

And do you accept express shipments during those ?

A. Any time while the store is open.

Q. And is the store open on Sunday?

A. Right.

And do you accept express shipments during that

Yes, sir.

And has Express Agency instructed you at all as to ime when you must keep your store open and the when you may or may not accept express shipments?

No.

That has been left to your own determination, I stand.

A. That is right.

Q. Now, do you also represent a bus line?

A. That is right.

Q. And what is the name of that bus line?

A. Evansville & Ohio Valley Railway Company.

Q. That used to be a traction line, did it not?

A. Yes.

Q. And do you sell tickets for that line?

A. Yes, sir.

Q. And how are you paid for the sale of such tickets?

A. By rent—rent for a certain portion of the store.

Q. Oh, I see. They pay you a flat payment a month, do they?

A. That is right.

Q. Well, now, is anything deducted from that for Social Security taxes?

A. No, not from the rent.

Q. So you are not considered an employee of the bus company in the sale of these tickets?

A. That is right.

Q. And do you have a portion of your store there where people can come in and sit down, waiting for the bus?

A. We have chairs there.

Q. I see. Do you ever get any circular letters from the bus company?

A. No.

1581 Q. Do you have any rules or regulations—

A. I get some circulars of probably a change of schedule—something like that.

Q. Change of schedules. And do you have any rules or regulations, any booklet, from them?

A. No.

Q. Would you consider renting the part of your premises now used for express to the Express Agency for the

ation of an express business by a regular salaried
oyee not connected with your business at all in the
t the express business were taken away from your
e?

You mean to say they hire a man for themselves?

Hire one of our own men and stick him in your store
e. Would you consider renting any part of the prem-
to him?

Yes.

You would?

. Yes. The express room is off by itself and doesn't
rfere with anything.

. What, if anything, has Railway Express Agency
ished you for the operation of your express business?

. I have a chest of drawers like, the office literature.

. I see. Such as?

. Bills of lading, etc.

. And your receipt forms and your tariffs and this
er-bound book entitled "Railway Express Agency,
eral Rules and Instructions"?

. Right.

. Was there anything else furnished?

. A scale.

. A scale.

. A platform scale.

. Do you ever have occasion to accept checks for ex-
ss charges from your patrons?

A. Oh, yes, lots of times.

2 Q. Now, are those checks drawn to your order or to the order of Railway Express Agency?

. Either to me, or else they are pay checks, etc.

. They are pay checks and endorsed to you?

. That is right.

. Now, do you accept those on your own responsibility?

. Yes. I cash them and send the money in.

Q. I see. Have you ever consulted Express Agency as to whether you might accept a check from any particular patron?

A. Only one time, when I first taken it over. I sent in a check, not knowing about they wouldn't accept checks, and they sent it back to me

Q. They told you they wouldn't accept checks?

A. That is right.

Q. So since then you have accepted checks on your own responsibility.

A. Yes, sir. I know practically everybody there.

Q. Do you pay Social Security taxes on the salaries paid your three adult employees?

A. Yes.

Q. That is including Mr. Lagrande?

A. Yes.

Q. And do you pay the tax on the entire salary you pay him?

A. Yes.

Q. Now, what would you say the ratio of your gross express commissions per month, or per year, whatever you wish to give us, is to your total income? That is your total—well, we'll say your total gross income now.

A. You mean including my—

Q. Yes. Including your express commissions, including everything you have there. You say it is $8 or $10 per month?

A. That is right.

Q. Now, would that be 1%, 2%, 3%, or what?

A. Well, it would be about 1%.

1583 Q. About 1%. Would you say, then, your gross income from your drug business is $800 per month, or would you say it was more?

A. Oh, it's about $8,000 a month—about $50,000 a year.

Q. Do you do any advertising in your town?

n the newspaper.

)o you ever have occasion to advertise the express?

Yes.

)o you consider that the express business causes

ers who might buy drugs to come into your place

ness?

That is right.

And is that one of the reasons why you accepted

press business?

Yes.

• • • •

Cross-Examination by Mr. Hassenauer.

Mr. Westfall, what is the population of Newberry,

a?

1,500.

And the only transportation service it has is from

s line?

That is right.

Can you tell us from what point to what point this

e operates?

Well, it operates from Cannelton to Evansville, and

boro to Evansville.

Owensboro, Kentucky. So it crosses the state line.

n interstate bus.

That is right.

So Newberry, Indiana, I take it, is not served by any

railroad?

No.

The State of Indiana has what is known as a gross

tax law, does it not?

A. That is right.

Q. Now, when you make your returns to the State

f Indiana on your income tax return, do you file a

return or do you separate the amount derived from your business from that which you received from the Express Agency in the form of commissions?

A. In a lump.

Q. With regard to any state taxes that might be levied on your business, does the state or the county distinguish between the property that you own and operate, more particularly with respect to the drug business, and that which you use to handle express, or is there just a rate covering the entire structure?

A. Covering the entire structure.

Q. Did you enter into a formal contract with the interstate bus line with respect to your selling tickets?

A. No. They just pay me so much a month. They call it rent. They didn't say anything in regard to what the duties were.

Q. Have you ever received any inquiry from the Interstate Commerce Commission to fill out with respect to your employment by the bus line, indicating whether or not you are an employee of the bus company?

A. No.

* * * * *

By Mr. Morgan:

Q. How did you come to take over the business for the Express Agency, Mr. Westfall?

A. Hunting business, trying to get along.

Q. Yes, sir, but who did you interview? Who interviewed you?

A. Mr. Dryer came in.

Q. Who is Mr. Dryer?

A. He is the route agent. He came in at the time the bus line was transferring from the traction line, and he found out that I was to be the bus agent, and he asked me if I would take on the express.

1585 Q. That is on a 15% commission basis?

A. That is right.

Q. Do you sell financial paper there?

A. No, sir.

Q. Do you handle any valuable shipments?

A. Oh, once in a while, a couple hundred dollars, something like that.

Q. All the money you collect, you report to the Express Agency?

A. Send it right in to the route agent.

Q. On the forms furnished you by the Express Agency?

A. No. I put it in an envelope, seal it, and send back my report.

Q. You don't fill out any forms at all?

A. No. I see to it that the money is collected and properly signed on the waybills, dated.

Q. Well, the waybills accompany that?

A. Oh, yes.

Q. That is what I'm asking. You don't just send the currency in the envelope without any explanation, or not accompanied by forms. That money is accompanied by the regular forms furnished you by the Express Agency.

A. The waybills, yes. That is sent back with the Social Security, etc., taken off.

Q. Do you pay a Railroad Retirement tax?

A. Oh, yes.

Q. Who handled the business before you took over, if you know?

A. It was handled by the agent of the E & OV, when they had the traction lines.

Examiner Funk: What is the E & OV?

Witness: Evansville and Ohio Valley.

Q. That is an electric line?

A. It was, but now it is a bus line.

Mr. Long: That is the same company that you represent as agent.

Witness: Yes.

1586 By Examiner Funk:

Q. Did you represent it as agent prior to the bus operations?

A. No. I happened to be on the highway, and when they transferred to busses they came up the highway.

Q. You were never employed by the railroad or worked in the transportation industry?

A. No.

Mr. Morgan: No further questions.

By Mr. Hassenauer:

Q. Mr. Westfall, did you ever receive a commission of less than 15% since you are handling the express?

A. It started out at 10%, and then it finally got up to 15.

Q. What were the circumstances surrounding that increase of 5%?

A. Well, he thought that I was entitled to it—the route agent did. He managed to get it, how I don't know.

Q. Did you say anything to him about the rate of commission? Did you insist at any time on getting a rate in excess of 10%?

A. I asked him several times if that was the best they could do, that was all. He said, "I'll see what I can do for you."

Q. If they had said that they couldn't pay you any more than 10%, would you have continued to handle that express at that rate?

A. Oh, yes. At that time, business was awful bad.

Q. Is that the reason why you continued to handle it at that rate if it had been 10%? —Because business was bad?

A. Yes, and people coming in for packages would naturally buy a few other items in the drug store, which mounted up.

* * * * *

By Examiner Funk:

Q. Mr. Westfall, did you sign the Express Agency 1587 Application for Employment?

A. No. —I can't remember. I'm trying to think whether he brought in a paper of some kind to sign, but if he did, I've forgotten.

Q. When the route agent comes in to your office, Mr. Westfall, or comes in to check your accounts, does he deal with you personally?

A. Well, yes. If he has anything to say, he always sees me, yes.

Q. Has he ever had any dealings with Mr. Lagrande?

A. No.

Q. What reports do you make to the Express Agency?

A. Just the reports of sending in the money and the waybills. That's all.

Q. How familiar are you with the General Rules and Instructions Mr. Long showed you?

A. Not very well, because if anything comes up that I'm in doubt about, I refer to the book.

Q. You look to the book as the source of your information?

A. Oh, yes. If I'm in doubt whether shipments should be made or can be made, I look in the book and see how it is to be done.

Q. Has any official of the Express Agency ever told you that you should look in that book for your guidance?

A. Not compulsory.

Q. Have they told you that that is where you can find the answers?

A. Yes.

Q. Have they ever directed your attention to any particular rules in there and told you you should follow them?

A. No. I just felt I had to look them over first and see if I was doing the right thing.

Q. Has the route agent or any other official of the Express Agency ever offered any criticism of your work?

A. Not unless I happened to make a shipment that went bad or something—about watching them to see that they were properly packed, etc.

Q. Did they instruct you then as to how to pack them?

1588 A. Well, they gave me an idea as to how they should be packed.

Examiner Funk: Mr. Long, do you have anything further?

Mr. Long: I'd like to just make clear one phase of it.

Redirect Examination by Mr. Long.

Q. You perform no pickup and delivery service in Newberry. Does the Express Agency have that service performed by anybody at Newberry?

A. That is up to the consignee. They have to get it to my place whatever way they see fit.

Q. I see. There is no pickup and delivery service, then, afforded by Railway Express Agency.

A. No, sir.

Mr. Long: That is all.

* * * * *

MR. G. C. LACE, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Long.

Q. What is your full name, Mr. Lace?

1603 A. G. C. Lace, L-a-c-e.

Q. And what, if any, relationship have you to Railway Express Agency, Incorporated?

A. I am employed by Railway Express Agency as Superintendent of Organization.

Q. And how long have you been so employed?

A. For the past twenty-eight years, I have been employed by Railway Express Agency and its predecessor, American Railway Express Company.

Q. That is, your employment began in 1920?

A. That is correct.

Q. Will you please detail the history of your employment with Railway Express Agency?

A. I entered the express service at Rockford, Illinois in March of 1920, and occupied various positions at that office until February of 1926, when I transferred to the position of agent at St. Charles, Illinois. I remained in that position for about four years, and in March 1930 I was appointed Traveling Commercial Agent, Mid-Central Department, with headquarters at Chicago. Then, in 1936, I was appointed Agent at Galesburg, Illinois, and in 1939, Route Agent, with headquarters at Galesburg, Illinois. In 1941, I was appointed District Sales Manager of the Mid-Central Department, with headquarters at Chicago, and following that, I was made District Manager of Public Relations, Mid-Central Department, with headquarters at Chicago, and on January 1, 1945, I was made Manager of Air Express, Central Department, headquarters at Chicago. March 1, 1946, I was appointed Superintendent of the Central Illinois Division, with headquarters at Chicago, and on April 16, 1947, I was appointed Superintendent of Organization, Central Departments, the position I now occupy.

Q. Will you describe the territory covered by the Central Illinois Division, of which you were superintendent up to April of 1947?

A. Generally speaking, the territory in that division

is from Chicago, Illinois, on the north, to East St.
1604 Louis, Centralia, and Evansville, Indiana, on the
south. It includes 441 offices, 383 of which are in the
State of Illinois, and 58 in the State of Indiana.

Q. Will you please describe the various classes of agents who represent Railway Express Agency in the Central Illinois Division?

A. There are five classes of agents: salaried, exclusive commission, joint railroad, merchant commission, and branch package receiving agents.

Q. Is the branch package receiving agent also sometimes referred to as the branch agent?

A. In some instances, yes.

Q. Will you define a salaried agent?

A. A salaried agent is an individual who devotes his entire time to the conduct of express business and is paid on a salary basis. Such agents usually represent the Express Agency at the larger offices.

Q. When you say "his entire time." I take it you refer to his entire working time.

A. That is correct.

Q. Now, will you define a joint railroad-express agent?

A. A joint railroad-express agent is an individual who devotes the preponderance of his time to railroad work and handles express work incidental to his railroad duties on the premises of his railroad employer.

Q. And please define a merchant agent.

A. A merchant agent is an agent who may be a company or an individual, who generally operates some other business and in connection therewith has agreed to represent the Express Agency in his community, which is usually a smaller one, on the basis of a commission, usually 10%. However, in some cases there may be a flat sum paid, and in still other cases a commission plus a flat sum for work performed such as pickup and delivery service.

Q. Now, will you define an exclusive commission agent?

A. An exclusive commission agent is an indi-
1605 vidual who, generally speaking, devotes his entire working time to the conduct of express work and is paid on a commission basis rather than on a salary basis.

Q. And now will you define a branch agent?

A. A branch agent is an agent who may be a company or an individual who operates some other business and who has agreed to accept express shipments on his premises.

Q. And who among these agents has the Express Agency considered and treated as employees?

A. The salaried agent and the exclusive commission agent.

Q. So the merchant agent and the joint railroad-express agent and the branch agent have not been considered as employees or treated as employees by Railway Express?

A. No, they have not.

Q. Is the exclusive commission agent given the benefit of paid vacations?

A. He is.

Q. Is the merchant agent given the benefit of paid vacations?

A. No, he is not.

Q. Is the joint agent given the benefit of paid vacations?

A. Not by the Express Company, but insofar as the railroads which serve the Central Illinois Division are concerned, the joint railroad agents are given a vacation by the railroad employer, who arranges for a substitute during their absence.

Q. You are speaking of the joint agents in the Central Illinois Division, I take it?

A. That is correct.

Q. State approximately how many of each class of agents were in the Central Illinios Division in 1946.

A. At that time, there were 38 salaried agents, 60 exclusive commission, 366 joint railroad agents, 21 merchant commission, and 8 package receiving agents.

Q. Or branch agents, as they are sometimes referred to

A. Yes.

1606 Q. Now, when did you discontinue being Superintendent of the Central Illinois Division?

A. On March 15, 1947.

Q. And you then became Superintendent of Organization?

A. That is correct.

Q. And that work takes you all over the Central Department, does it?

A. It does.

Q. Will you describe the Central Department—that is the boundaries of the Central Department—roughly?

A. On the northwest, it goes to Spokane, Washington on the east, as far as Pittsburgh, south, as far as St. Louis and northeast it includes the upper peninsula of Michigan I think that, generally, is the boundary.

Q. Now, while you were acting as Superintendent o the Central Division, what where your duties, particularl with respect to the employment, promotion and discharg of employees?

A. As Superintendent, I had direct jurisdiction ove all of the route agents, agents and messengers in the division, and approved or disapproved all applications for employment.

Q. Please explain how a driver, for instance, was employed and is employed in a salaried agency.

A. The agent interviews the individual, and if he appears to have the qualifications they are seeking, he requires him to fill out an application for employment, secure a set of finger prints, and requires him to submit to a physical examination by a medical examiner of our choice. The completed application, the finger print card and the medical examiner's report are then sent to the superintendent.

Q. And what does the superintendent do when he receives these papers?

A. He investigates the background of the applicant, communicates with the references given, and then approves or disapproves the application, depending on the information secured.

Q. This application you speak of is Express Agency Form 100?

1607 A. That is correct.

Q. Now, is an applicant for a merchant agency required to submit to a physical examination?

A. He is not.

Q. Or is he required to furnish a photograph?

A. He is not.

Q. Are applicants for employment as employees required to furnish a photograph?

A. They are.

Q. Are any employees of a merchant agency required to fill out any Application for Employment by Railway Express Agency?

A. No, they are not.

Q. Are merchant agents fingerprinted?

A. No, they are not.

Q. Are any employees of merchant agents fingerprinted?

A. No, they are not.

Q. Does the superintendent have anything whatever to do with the employment of individuals who assist the merchant agent in the performance of the work he agrees to have performed for the Express Agency?

A. Nothing whatever.

Q. Describe the purpose of Railway Express Agency

Form 100 entitled "Application for Employment wit Railway Express Agency, Incorporated."

A. The purpose of that form is to secure informatio with respect to the backgraund and experience of the applicant.

Examiner Funk: Pardon me, Mr. Long. You have, o course, at the first hearing introduced an Application fo Employment form. You advised me that that applicatio has recently been changed. Is he testifying now wit regard to the old form or the new form?

Q. Are applicants for employment as employees wit Railway Express Agency required to fill out Applicatio for Employment, Form 100, which is currently used b Railway Express Agency?

A. They are.

1608 Q. And prior to 1945, did that form include provisions under the title "Appiication For Fidelit Bond?"

A. It did.

Q. I show you Form 100 and ask you if that was th form which was in use between and including Decembe 1937 and November 1945.

A. Yes, that is the form.

Mr. Long: I offer that in evidence.

Examiner Funk: This is the old form you are furnishing now?

Mr. Long: Yes. This is the one that was effective December 1937. I don't have any copies of that one that wa effective in 1930.

(Railway Express Agency Form No. 100 (12-37) Application for Employment with Railway Express Agency, wa received in evidence and marked EXHIBIT NO. XVI.)

Q. Now I show you Form 100 and ask you if this for is the one which became effective in November 1945.

A. It is.

Mr. Long: I offer that in evidence as Exhibit XVII.

Examiner Funk: It will be so received.

(Railway Express Agency Form No. 100 (11-45), Application for Employment with Railway Express Agency, was received in evidence and marked EXHIBIT NO. XVII.)

(Remarks off the record—at Examiner Funk's request.)

Q. I direct your attention to that part of Exhibit No. XVI under the title "Application for Fidelity Bond," reading: "The Subscriber agrees that he will throughout his employment by the Company faithfully perform all of his duties, including the keeping of true and correct accounts of the business of the Company conducted by him or in his charge, all as required by the rules and regulations of the Company; and he understands and agrees that he is to be held personally responsible for the repayment to the Company of any and all losses which it may sustain through his failure to do so." Now I ask you what application that clause has to the merchant agent.

A. That clause covers the performance of work the merchant agent agrees to have performed in accordance with the specifications set forth in our General Rules 1609 and instructions.

Q. Do you know how long a period it has been the custom of the Express Agency and its predecessors to have merchant agents sign the current Form 100?

Examiner Funk: The current form?

Mr. Long: I should say the Form 100 currently in use at the time the arrangement with the merchant agent was made.

A. Ever since I have been in express business—that is, since 1920—no separate form was devised for independent contractors, merchant agents. It was the policy to use this one form both for independent contractors and for application for employment.

Q. Do you know of any instance where Form 100 was

filled out by an assistant, helper or employee of a merch
agent?

A. I do not.

Q. Under what circumstances is Railway Expr
Agency represented by the salaried agent?

A. At offices usually where there is sufficient work
one employee or more—usually at the larger offices.

Q. That is, sufficient work to keep one or more employ
engaged full time. Is that correct?

A. That is correct.

Q. Will you name some salaried offices in the Cen
Illinois Division?

A. Danville, Illinois; Dwight, Illinois.

Q. And how many employees of the Express Age
are there at each of these agencies, including the sala
agent?

A. At Danville, 35, and at Dwight, one.

Q. At Dwight, there is just the agent. Is that corr

A. That is correct.

Q. Under what circumstances, generally, is Rail
Express Agency represented by the exclusive commis
agent?

A. Usually at medium sized offices where there is
cient work for one or more employees.

1610 Q. That is, full time?

A. Full time.

Q. Can you name an exclusive commission agent i
territory of the Central Illinois Division?

A. Jerseyville, Illinois.

Q. And how many employees are engaged in
agency?

A. Only the agent.

Q. Under what circumstances, generally, is Rai
Express Agency represented by the joint railroad-ex
agent?

A. At the smaller places where the railroad agent is able and willing to handle the express part.

Q. And under what circumstances, generally, is Railway Express Agency represented by the merchant agent?

A. At those smaller places where they are unable to make an arrangement with the joint railroad agent.

Q. Now, some merchant agents have testified here and have indicated that their gross commissions have been in the neighborhood of $200 or more per month. Is that usual with merchant agencies, or is that unusual?

A. It is unusual.

Q. And is it a fact that those who do receive commissions approximating $200 per month have represented the Express Agency for a long period of time?

A. Usually, that is true.

Q. And the business has grown up with them. Is that a fact?

A. That is correct.

Q. Now, who has the right to decide who shall have the key to the merchant agency?

A. The merchant agent only.

Q. And who decides which patrons in the business of the merchant agent, including those seeking to use Railway Express Agency, shall be served first?

A. The merchant agent.

1611 Q. And who decides the manner in which such patrons shall be served?

A. The merchant agent.

Q. How are merchant agents paid for the work performed at their agencies?

A. Usually they are paid on a commission basis, but in some cases they are paid a flat sum, and in still other cases a flat sum plus a commission.

Q. What do such payments cover?

A. All of the work performed at the agency by the merchant agent.

Q. Do they also cover the use of the premises, gener ally?

A. The use of the premises, generally, the use of th telephone, light, heat, etc.

Q. Do some merchant agents provide pickup and d livery service in connection with their merchant agency?

A. They do.

Q. And when the merchant agent furnishes pickup an delivery service, who furnishes the vehicle used to pe form such service?

A. The merchant agent.

Q. And who pays for the gasoline in the operation the vehicle?

A. The merchant agent.

Q. And who pays for the insurance on the vehicle?

A. The merchant agent.

Q. And who pays for the upkeep of the truck?

A. The merchant agent.

Q. And who decides where the truck shall be repaire when necessary?

A. The merchant agent.

Q. And who decides when it is necessary to repair th truck?

A. The merchant agent.

Q. What does Railway Express Agency generally fu nish the merchant agent? Usually, a set of tariffs, statio ery supplies, forms necessary to the conduct of the bus ness, such as receipts for shipments, receipts for charge copy of the regulations covering the transportation of e plosives, in some cases scales, four-wheel trucks
1612 some cases, and perhaps in a few cases office safe

Mr. Long: Regulations concerning the transporta tion of explosives were specified, and I believe, Examine Funk, you asked me to produce a copy of those.

Examiner Funk: Yes. That was discussed yesterda when one of the merchant agents was on the stand.

Q. I show you paper-bound book entitled "Railway Express Agency, Incorporated, Interstate Commerce Commission Regulations for the Transportation of Explosives and other Dangerous Articles by Express, including Specifications for Shipping Containers," and ask you if that, together with Supplement No. 7 to I. C. C. No. 4670, Supplement 9 to the same tariff, and Supplement 11 to the same tariff constitute the current regulations for the transportation of explosives and other dangerous articles by express.

A. They do.

Mr. Long: I offer these in evidence.

Examiner Funk: They may be received.

(The above-described paper-bound books were received in evidence and marked EXHIBIT XVIII, A, B, C and D, respectively.)

Q. Exhibit No. XVIII, A, B, C, and D, are furnished the merchant agent, are they not?

A. They are.

Mr. Long: Just for the purpose of the record, I'd like to direct the attention of the Examiner to the fact that Exhibit No. XVIII refers specifically to specifications as such. It goes from Specification 1-A through Specification 45-B, and those are specific specifications of the Interstate Commerce Commission. I would also like to direct the Examiner's attention to the fact that these documents have an Interstate Commerce Commission number, and also a motor carrier number, indicating that they are filed with the Interstate Commerce Commission, and there is a statute which I can't give you definitely now which provides that they may be accepted in evidence without certification.

1613 (Whereupon a recess was taken, from 3:30 p. m. to 3:55 p. m.)

Q. Are letters or bulletins addressed by the superintendent or other officers of the Railway Express Agency sent to the merchant agent?

A. Some of them are.

Q. And what is the nature of such letters or bulletins which are sent to the merchant agent?

A. They contain information with respect to embargoes, regulations governing the transportation of live shipments into certain states, rate information, etc.

Q. That is, rate information that applies to shipments that are received for transportation express service at those agencies?

A. Yes, sir.

Q. Would you say that such letters or bulletins are in the nature of specifications as to the handling of express business in such offices?

A. Yes, sir.

Examiner Funk: Mr. Long, for the purposes of the record, would you mind stating your definition of the term "specifications?" You know, this book is referred to as "General Rules and Instructions."

Mr. Long: Yes. Well, I would say that specifications, as I have used that term, apply to the method of handling express shipments so that conformance will be had to the requirements of the Interstate Commerce Commission and the Interstate Commerce Act, and to business-like handling of express shipments. It has nothing whatever to do with the manner in which a vehicle is to be driven, with the clothes that any individual representing the Express Agency at a merchant agency should wear, with whether a merchant agent must first serve a patron who has called at his place of business to have a shipment transported in express service, or to the manner in which the agent shall greet the patron or the manner in which any of his employees shall greet the patron. It has only to do with the performance of the express business in a business-

1614 like fashion and in conformance with the regulations. That is what I would say specifications mean.—For the purpose of the record, I perhaps should ask leave to give a more complete definition of that term as used here. I hadn't expected to be asked to define that, and I should like an opportunity of using that proper language which will, as clearly as I can, define it.

Examiner Funk: Granted.

Q. Is Railway Express Agency represented in some small places by a housewife who conducts the agency in her home?

A. It is.

Q. Are such housewives considered merchant agents?

A. They are.

Q. I direct your attention to Chenoa, C-h-e-n-o-a, Illinois, and ask you whether the agency at that point is within the Central Illinois Division.

A. It is.

Q. Will you describe the circumstances of that agency?

A. That is a merchant agency, although not wholly within the pattern of merchant agencies. We are represented there by a Roscoe Wilson, who is a poultry buyer and a janitor. We furnish the quarters in the railroad depot in which Mr. Wilson takes care of the express work.

Q. Can you state approximately how many hours a day he works in express work?

A. Probably one hour, or perhaps an hour and a half or two hours.

Q. I understand, then, that Mr. Wilson is considered a merchant agent?

A. Yes. He is one of the few who do not fall completely within the general pattern. Chenoa is a small town, the express business doesn't amount to much, and it was necessary to place the express work with someone who has other income and was willing to or wished to take care of the express business.

Q. Do joint agents spend a full working day on the job as joint agents for their railroad employer?

A. They do.

1615 Q. Who arranges for a substitute employee when a joint agent takes a vacation?

A. The railroad.

Q. That is, his railroad employer?

A. That is correct.

Q. Are employees of Railway Express Agency granted a paid vacation?

A. They are.

Q. And who arranges for a substitute employee when a Railway Express Agency employee takes a vacation?

A. The route agent or superintendent or agent.

Q. Do merchant agents receive a paid vacation for their express work?

A. They do not.

Q. If a merchant agent takes a vacation, who arranges to take care of his express work?

A. The merchant agent makes whatever arrangements are necessary.

Q. Does the superintendent having jurisdiction over the territory in which the merchant agency is located, or does the route agent, have anything whatever to do with that?

A. No, nothing whatever.

Q. Are employees of Railway Express Agency entitled to free passes on the railroads?

A. They are.

Q. Are merchant agents entitled to free passes on the railroads?

A. No, they are not.

Q. Who determines where in the merchant agent's place of business the express work shall be performed?

A. The merchant agent.

Q. Who, if anybody, has exclusive right to determine who shall have entrance to the place of business where the merchant agent performs express work?

A. The merchant agent.

Q. Who fixes the merchant agent's hours of work?

1616 A. The merchant agent.

Q. Who determines the number of employees that the merchant agent shall have?

A. The merchant agent.

Q. Who determines the hours of work of the merchant agent's employees?

A. The merchant agent.

Q. Does the superintendent or the route agent or any other person connected with Express Agency have anything to do with that outside of the merchant agent himself?

A. No, sir.

Q. Who fixes the time for opening and closing the merchant agent's place of business?

A. The merchant agent.

Q. Does the superintendent or the route agent or anybody other than the merchant agent himself have anything to do with the hiring of the assistants, employees or helpers of the merchant agent?

A. No, sir.

Q. Or of the discharge of discipline of the assistants, employees or helpers of the merchant agent?

A. No, sir.

Q. Does Railway Express Agency have anything whatever to do with the determination of the wages of the merchant agent's assistants, employees or helpers?

A. Nothing whatever.

Q. Does the merchant agent consult the superintendent, the route agent or any other official or representative of Railway Express Agency before hiring or firing any of his assistants, helpers or employees?

A. No, sir.

Q. Prior to the enactment of the Railroad Retirement

Act, were any merchant agents required to report to Railway Express Agency any expense in the operation of their merchant agency?

A. No, sir.

1617 Q. Subsequent to the enactment of the Railroad Retirement Act, and subsequent to the time Railway Express Agency was directed to report to the Railroad Retirement Board compensation merchant agents earned in the operation of their merchant agencies, what records, if any, were the merchant agents required to supply Railway Express Agency with respect to compensation earned by them in the operation of their agencies? Now, that is rather a long question, and perhaps you would like to read that question before you answer it.

A. I think I understand the question.

Q. All right, then. Will you answer it?

A. The Form 7050, titled "Receipts and Expenses of Commission Agents," and Form 7051, "Wages Paid to Individuals by Commission Agents."

Q. Now, is Form 7050, Exhibit No. X-A, B and C, which I now show you, the Form 7050 to which you refer?

A. It is.

Q. And is Form 7051, Exhibit No. XIII, which I now show you, the Form 7051 to which you refer?

A. It is.

Q. Are merchant agents required to furnish the superintendent with Forms 7051 and 7050?

A. No. They are sent to the district accountant.

Q. Did you, as superintendent, attempt to exercise any control over the expenses of merchant agents in the Central Illinois Division?

A. No, I did not.

Q. Did you ever make any suggestions to them as to their expenses?

A. No, I did not.

Q. I direct your attention to paper-bound book entitled "Railway Express Agency, General Rules and Instructions," which is Exhibit 8 accepted in evidence at the first hearing, and specifically to Rule 820 therein, which reads: "No employe is permitted to delegate to another person any portion of his duties, unless authorized to do so by his superior officer," and ask you if that rule applies to merchant agents.

1618 A. No, it does not.

Q. Rule 821 of the same exhibit reads: "Employes will be regarded as in line for promotion based on faithful and intelligent discharge of their duties, length of service and capacity for increased responsibility." I ask you if that rule applies to merchant agents.

A. No, it doesn't.

Q. And do Rules 820 and 821, which I have read to you, apply to any of the assistants, employees or helpers of merchant agents?

A. No, they do not.

Q. Are merchant agents furnished a badge?

A. No, they are not.

Q. Are regular employees of Railway Express Agency furnished a badge?

A. Yes, sir.

Q. I understand that you are not furnished with a badge, are you, Mr. Lace?

Q. Only those employees who contact the public are furnished with a badge.

Q. Are any of the employees, helpers or assistants or merchant agents furnished with a badge?

A. No, sir.

Q. I direct your attention to Rule 828 of the General Rules and Instructions, Exhibit 8 in evidence at the first hearing, reading: "Employes who receive and deliver goods elsewhere than at the Company's offices must wear the Company's regulation badge on the front of their ca while on duty. If badge is lost, stolen, or damaged, promp report must be made to the official who furnished it." Doe that rule apply to merchant agents?

A. No, it does not.

Q. Does it apply to any of the assistants, helpers o employees of merchant agents?

A. No, it does not.

Q. Now I direct your attention to Rule 624 of the sam
Exhibit 8, reading: "Any employe entrusted wit
1619 keys to safes, money drawers, etc., should carry suc
keys on a ring, and must at all times keep them wher
they cannot be taken or used without his knowledge.'
Does that apply to merchant agents?

A. No, it does not.

Q. Does that apply to any of the employees, helper or assistants of merchant agents?

A. No, it doesn't.

Q. In the event a merchant agent or one of his assis ants should in the performance of express work do an act which you considered as negligently jeopardizing th safety of passengers or outside individuals, what actio would you take, as a superintendent?

A. I would ask him to refrain from such practices i the future.

Q. And in the event he failed to mend his ways, wha punishment, if any, would you be in a position to mete ou to him?

A. I could not demote him, or I couldn't punish hi by suspending him. The only thing that could be do would be to discontinue the arrangement. Of course, i that were done, we would lose the benefit of his premise in which the express agency is operated.

Q. So that before you could discontinue the arrange ment, it would be necessary for you to look around an find another place where the Express Agency could operate in that particular locality. Is that true?

A. Yes, sir, that is true.

Mr. Long: I presume notice will be taken of the fact that the Express Agency must serve localities unless it obtains permission from the proper authority to discontinue the service at that point.

Examiner Funk: We will take notice.

Q. What rules and instructions, if any, in the General Rules and Instructions, Exhibit 8 in evidence at the first hearing, do apply to merchant agents?

A. Only those rules which are in the nature of specifications as to how the work is to be performed.

1620 Examiner Funk: When you use the word "specifications," are you referring to the term as defined by Mr. Long?

Witness: I am.

Q. I direct your attention to Rule 831 in the General Rules and Instructions, reading: "Drinking intoxicating liquor, gambling or the use of profane or vulgar language while on duty, or excessive use of intoxicating liquors while off duty will be sufficient cause for investigation and dismissal," and ask you whether or not that rule applies to merchant agents.

A. No, sir.

Q. And does that rule apply to the assistants, helpers or employees of merchant agents?

A. No, it doesn't.

Q. If a merchant agent should become unfit, in the opinion of you, as superintendent, with respect to his dealing with patrons of the Express Agency or patrons at his agency, what, if anything, could you, as superintendent, do about it?

A. The only thing I could do would be to discontinue the agency.—Mr. Long, in using the term "unfit," do you mean incapable or, just because of services, unsatisfactory?

Q. I include in that term anything which in the opinion of the superintendent would render the merchant agent as unfit or an improper agent to continue to represent him.

A. It does not include incapable by physical reasons?

Q. Yes. It would include incapable by any cause whatever. —I understand your answer to be that you would discontinue the arrangement?

A. Yes, that is correct, provided we could obtain the services of another merchant agent, or in the event of a very small office where we were handling a very small amount of business, we might seek authority from the proper commission to close the office.

Q. But it would be necessary before you could make a change to either obtain authority from the proper 1621 commission to close the office, or locate another place in the locality where the express business could be conducted. Is that true?

A. That is true.

By Examiner Funk:

Q. Mr. Lace, suppose one of these merchant agents embezzled funds. Would you continue him as merchant agent until you found another place to set up a merchant agency?

A. You are referring to express funds?

Q. Express funds. What would you do?

A. We, of course, would first attempt to find someone else. Failing to do that, we would notify the Commission that we were forced to temporarily discontinue business at that locality and seek authority for the community to remain without an express office until suitable arrangements could be made.

Q. Wou'd you retain him, though, as merchant agent while you were looking for another place, or would you immediately suspend operations and immediately notify the Commission?

A. Well, of course, that would depend possibly on the amount of funds embezzled and the amount of business in the community.

Q. Would your answer apply if it was found that this merchant agent was being drunk at all times and wasn't attending to business, and had no assistants there to perform the work? What would you do then?

A. If he had no assistants to perform the work, then the same method would be followed.

By Mr. Long:

Q. Well, now, Mr. Lace, it is possible, I suppose, that a merchant agent might be killed or might die suddenly, in which event, if he was the sole man at the spot who performed any work, even though he only had a shipment per day, I presume you would send a route agent up there to take care of the business and attempt to find somebody to replace that man as soon as possible, would you not?

1622 A. That is the usual procedure.

Q. Yes. And if the route agent couldn't find a place where he could conduct the business, the business just wouldn't be handled for a time. Is that right?

A. That is correct.

Mr. Long: I believe that judicial notice will be taken of the fact that the proper authority would not fine us for our failure to carry on the business under such circumstances.

Q. I direct your attention to Rule 920 of the General Rules and Instructions, reading: "The telephone is furnished for the Company's business; employes should not be permitted to use it for personal matters except in case of emergency," and ask you if that rule applies to merchant agents.

A. No, it doesn't.

• • • • •

By Mr. Long:

Q. That would be true so long as the Express Agency' business was handled in accordance with the results tha we expect from the merchant agent. Is that correct

1623 A. Yes. Usually, in the kind of towns wher we have merchant agents, the number of telephon calls are very few.

Q. What is the difference between a merchant agenc and an exclusive commission agency?

A. The principal difference is that in connection wit the exclusive commission agency we usually furnish th premises. There are some very few exceptions to tha That, of course, means that at an exclusive commission office, if the agent should resign by reason of hi own desires or should be discharged by Railway Expres Agency, we could place another agent in that locality Usually, the exclusive commission agents receive net income in excess of $125 per month, consequently thei positions are subject to bulletin and assignment, the sam as all other positions coming under the agreement.

By Examiner Funk:

Q. Mr. Lace, with reference to this $125 minimum, o however you refer to it, do you consider agencies tha have that $125 minimum to be, all of them, exclusive commission agents?

A. No.

Q. How did you happen to choose that figure?

A. I can't answer that.

Q. It has no significance, you mean?

A. I think it has, but I do not know how that figur was arrived at.

Mr. Long: Could I ask a question?

Examiner Funk: Yes.

By Mr. Long:

Q. Is it not a fact, Mr. Lace, that exclusive commission agents are required to spend their full working time in the service of the Express Agency?

A. Generally speaking.

Q. And anyone spending his full working time in the Express Agency usually obtains commissions in excess of $125 per month. Is that right?

1624 A. That is right.

By Examiner Funk:

Q. When you say "generally speaking," Mr. Lace, are there exceptions to that rule?

A. Yes.

Q. Could you describe some of those exceptions?

A. I don't know as I can name the office, but I believe that we have exclusive commission agents who devote perhaps a very small part of their time to some other work.

Q. Some other business, perhaps?

A. Yes—some other business or work.

Q. How do you distinguish between that type of an exclusive commission agent and a merchant agent?

A. In the cases I have in mind, we control the premises of that agency.

Q. Is that the only distinction, Mr. Lace?

Mr. Long: Could I ask some questions on that?

Examiner Funk: Surely.

By Mr. Long:

Q. All exclusive commission agents are granted a paid vacation, I understand. Is that true?

A. Yes, sir.

Mr. Crawford: Mr. Examiner, pardon me. I don't want to get technical, but I believe those questions are put to Mr. Lace, and Mr. Long is answering the questions.

Examiner Funk: I believe that is correct, Mr. Lo
If that is the type of question you are going to ask hi
I'd like to have Mr. Lace's own answer.

Mr. Long: Fine. I was just reminding Mr. Lace it
a fact.

Q. Now, are there other distinctions—

Examiner Funk: Mr. Long, pardon me. I don't wa
to interrupt you, but I would like to have Mr. Lace elabor
a little bit on that.

1625 A. In most instances, the commissions paid
merchant agents are small in comparison to the
clusive commissions paid. However, there are some
ceptions.

By Examiner Funk:

Q. Well, Mr. Lace, looking at these exhibits which
press Agency has submitted with regard to the gross
net earnings of the merchant agents, I note that some
their commissions are rather large.

A. Yes. As stated, there are some exceptions,
usually that situation exists because at the time the
rangement was made the amount of express business
that town was small.

Q. Is there any actual difference in the duties
formed by the exclusive commission agent and the
chant agent?

A. In either case, of course, it is required that al
the express work at the town be handled by the agent
someone delegated by the agent, so that there is li
if any, difference in the work. Express work is sim
all over.

Q. Their duties, then, are very similar. Is that a
rect statement?

A. The duties consist of handling express shipme

Q. You stated that there are exceptions to the u exclusive commission agent in that there may be a few of them that engage in some other occupation on the side. Would you say that there is any distinction between that type of exclusive commission agent and the other type of exclusive commission agent to which you have referred?

A. Yes, I would, because in the exceptions I noted, I was referring to something where the outside business would take only a very small part of their time.

Q. What do you mean by a very small part of their time?

A. Oh, perhaps thirty minutes a day or something like that.

Q. Are any of these exclusive commission agents engaged in performing any other transportation service?

A. Not that I know of.

1626 Q. Are any of these merchant agents engaged in performing any other type of transportation service?

A. Yes, some of them.

Q. Can you describe that type of service?

A. There are some instances where the merchant agent will operate an over-the-road truck route.

Q. Are there any of them employed in the transportation service other than being engaged in the operation of an over-the-road truck route?

A. None that I know of.

Q. I believe you said that as a general rule the Express Agency furnishes the premises for exclusive commission agents.

A. Yes, that is true.

Q. Are there exceptions to that?

A. None that I know of.

* * * * *

By Mr. Long:

Q. Is it a fact, Mr. Lace, that some exclusive commission agents are located in localities where the express business has fallen off to a level where their commissions are und $125, and we have continued them at that office as exclusi commission agents?

A. I think it is.

Examiner Funk: Mr. Long, is that a figure that t Express Agency sometime in the past establishe

1627 Mr. Long: For exclusive commission agents?

Examiner Funk: Yes.

Mr. Long: Yes. That is a description of an agent th has been in the express business for—well, these gentlem here can answer that better than I can because I haven been in that business that long.

Examiner Funk: When was the figure $125 first adopte do you know?

Mr. Long: I don't know.

Examiner Funk: You will have someone testify that point?

Mr. Long: Well, we will have someone testify.

Examiner Funk: If there is no objection, I think I me tioned earlier that we would try to recess at about fou thirty.

* * * The hearing recessed at 4:40 P. M., August 1948 * * *

1628 August 12, 1948.

* * * The hearing reconvened at 10:10 A. M., Augu 12, 1948 * * *

Examiner Funk: Mr. Long.

Mr. Long: In amplification of the statement I ma yesterday as to the meaning intended in the use of the te "specifications," I would like to say that Webster's N International Dictionary defines "specifications" as mea ing, among other things: "The designation of particular particular mention; as, the specification of a charge agai an officer; esp., a written statement containing a minute description or enumeration of particulars, as of charges against a public officer or of the terms of a contract."

By the term "specifications" in relation to the General Rules and Instructions, Exhibit 8 in evidence at the first hearing, we mean a spelling out of the terms of the contract with respect to the work these merchant agents agree to have performed. The specifications for a house would indicate the fashion of that house—that is, whether it would have an exterior of brick or of wood, a fireplace, a shingled roof or a slate roof—a fashion of work. These merchant agencies must conform to the requirements of the Interstate Commerce Act and must conform to a standard so that the shipments will be transported expeditiously and with a minimum of breakage or damage or loss. To accomplish these results certain specifications or terms of the contract must be stated when the arrangement is entered into, as without them, results of expeditious transportation with the minimum of breakage, damage or loss would not be obtained. So it is also true of a house. You set forth in your specifications for your house the quality of brick, the mixture of mortar required for the best job, and the kind of wood for use in the inside trim, and you may have an architect on the job to see that those specifications are complied with.

In order to comply with the Interstate Commerce Act,
we require that all shipments be receipted for on the
1629 company's regular authorized express receipts. Rule
120 of the General Rules and Instructions so specifies.
It reads: "Only the company's regular, authorized express receipt, including special contracts and shippers' forms authorized by the company in accordance with Traffic Department Instructions may be used." In order to provide for expeditious transportation and prompt delivery, Railway Express requires of its agents a certain standard as

to the marking of shipments. For example, see Rules 10 and those following of the General Rules and Instructions, particularly Rule 13, which reads: "The state name must be written out sufficiently to avoid confusion: for example, Calif. and Colo. for California and Colorado; Utah and Vermont, not Ut. and Vt." As to those rules which apply only to employees and not merchant agents, and which do not concern the specifications or relate to results, I believe Rule 820 may be considered an excellent example. That rule reads: "No employe is permitted to delegate to another person any portion of his duties, unless authorized to do so by his superior officer." I think the record has shown that these merchant agents have delegated their work without consulting anybody.

* * * * *

By Mr. Long:

Q. Mr. Lace, I believe your testimony ended last night in connection with the difference between a merchant agent and an exclusive commission agent. Now, since last night, have you had occasion to consider those differences?

A. I have.

Q. And are you in a position now to specify what those differences are, generally and specifically?

1630 A. I think I have already stated that one difference is that we have control of the premises at an exclusive commission office. Another difference is that we control the manner in which the work is to be performed at an exclusive commission office, whereas we do not at a merchant agency office. Another difference is that agents at exclusive commission offices are eligible for promotion and are promoted.

Q. Now, with respect to that, do you know of any specific instances where an exclusive commission agent has been promoted?

A. Yes. Several of them were promoted during the time that I was superintendent of the Central Illinois Division. J. W. Dodt, Agent, Salem, Illinois, exclusive commission office, was promoted to the position of agent at Urbana.

Q. Was that exclusive commission agent promoted to a salaried agency?

A. He was.

Q. Now, do you know of any exclusive commission agents who have been promoted to a larger and different exclusive commission agency?

A. Yes.

Q. Do you recall the places if you do not recall the name?

A. B. D. Baker, presently exclusive commission agent at Salem, Illinois, was an exclusive commission agent at a smaller commission office, but I can't just recall the office.

Q. Can you ascertain what that smaller office is by examining the records of the company?

A. Yes.

Q. And will you do that between now and tomorrow, so that we can present it to the Board?

A. Yes, sir, I shall.

Q. Now, do you know of any instance where a merchant agent has been promoted?

A. No, I do not.

Q. And is a merchant agent subject to promotion in express business?

A. No, he is not.

Q. Do you know of any instance where a merchant
1631 agent has been moved from the place where he
operated his merchant agency to any other place?

A. No, I do not.

Q. Now, are there any other differences that you recall between the merchant agency and the exclusive commission agency?—You have been with Railway Express Agency and its immediate predecessor since 1920?

A. That is correct.

Q. Do you know whether exclusive commission agents were subject to the pension rules of the predecessor o the Express Agency and Railway Express Agency?

A. No, I do not.

Q. I believe you may have mentioned something abou vacations.

A. The exclusive commission agents are granted vacations, whereas the merchant agents are not; and also w have control of the conduct of the exclusive commissio agent, whereas we do not over the merchant agent.

By Examiner Funk:

Q. Mr. Lace, are exclusive commission agents carrie on any seniority roster of the Express Agency?

A. At the office.

Q. Are merchant agents carried on any seniority roster?

A. No.

Q. Do you know whether any of the predecessors o the Railway Express Agency have ever granted free transportation to merchant agents?

A. No, I do not.

Q. Do you know whether they granted free transportation to exclusive commission agents?

A. No, I do not.

By Mr. Long:

Q. Will you describe the merchant agencies in the Cen tral Illinois Division at the time you were superintenden there, and particularly in 1946? I understand you mad a survey of those agencies.

1632 A. Yes, sir. At Armstrong, Indiana, a merchant commission agency is operated. W. C. Korff, K-o-r-f-f, is our agent at that office. He operates a grocery store, in which he has invested approximately $3,000.

Q. That information with respect to the investment—was that obtained from the agent, or did you obtain it from some other source?

A. From the agent. He is also postmaster of that town. His wife and other members of the family assist him in express work if necessary; however, only a small amount of express work is handled at that office. In March of 1946, a representative month, 7 shipments were handled; in March 1948, 5 shipments were handled.

Another merchant agency was located at Barry, Illinois. Our agent at that point was Mary McCartney, M-c-C-a-r-t-n-e-y. She informed us that she had approximately $10,000 invested in a dray line, which she operated. In March of 1946, we handled 303 shipments at that office. On August 5, 1947, that office was changed to a joint railroad agency.

Q. And is it presently a joint railroad agency?

A. It is presently a joint railroad agency.

Examiner Funk: Does Mrs. McCartney still perform express work, or is that now handled by a joint railroad agent other than her?

Witness: The joint railroad agent handles the express work.

Examiner Funk: Mrs. McCartney is not the joint agent.

Witness: That is correct.

A. At Carrollton, Illinois, we were represented by a merchant agent, Mr. L. P. Simpson, who operated a retail hardware and furniture store and an undertaking establishment. He informed us that he had approximately $70,000 invested in that business. His employees, six in number, and his wife, assisted him to some extent in the handling of the express work.

Q. Did I understand you to say that his six employees assist him in the handling of express work?

1633 A. To some extent.

Q. Do you know the extent that they do assist him?

A. I know only that an employee by the name of Virginia Imus, I-m-u-s, prepares most of the reports, if not all, and there is another employee—I'm not certain of his name—who performs most of the pickup and delivery work. In March 1946, that office handled 599 shipments; in March of 1948, 374 shipments.

At Cerro Gordo, C-e-r-r-o G-o-r-d-o, Illinois, we had a merchant commission agency. J. Harry Cox was our agent. He operated a grain, feed and coal establishment, and was assisted to some extent in the express work by his wife and daughter. In March of 1946, we handled 223 shipments at that office; in March 1948, 79 shipments.

At Charlotte, C-h-a-r-l-o-t-t-e, Illinois, we had a merchant agency. Henry Sterrenberg, S-t-e-r-r-e-n-b-e-r-g, was our agent. Mr. Sterrenberg operates a retail general merchandise store, and is township supervisor. He informed us that he had approximately $8,000 invested in his business. During March 1946, we handled 3 shipments at that office, and in March of 1948, 2 shipments.

At Chenoa, C-h-e-n-o-a, Illinois, we had a merchant commission agency. Our agent was Roscoe Wilson, who is a poultry buyer and a church janitor. In March 1946, we handled 364 shipments at that office, and in March 1948, 284 shipments.

At Davis Gardens, Indiana, we had a merchant commission office. Our agent was Ruth D. Owen, O-w-e-n, who was connected with a greenhouse located at that office. In March 1946, we handled 532 shipments, and in March 1948, 277 shipments.

Mr. Crawford: Pardon me for interrupting, Mr. Lace. Mr. Lace said, "who was the agent at that time." I'm wondering if that is the same agency there now, or is he bringing it right up to date.

Mr. Long: Mr. Lace can answer that question.

A. I thought the question was I should give this information as of the time when I was superintendent of 1634 the division. However, there have been some changes since then and I have mentioned them.

Q. Now, about this last agency? Do you know whether the facts concerning which you have now testified still pertain to that agency?

A. That is right.

Q. She is still the agent?

A. Yes. I think the only changes so far as those I have already mentioned were Simpson at Carrollton, who is no longer agent.

Q. Who is your agent there now, do you know?

A. J. E. Becker.

Q. Is he a merchant agent?

A. He is.

Q. And what is his business?

A. Filling station, retail oil.

Q. And has he any connection whatever with any railroad?

A. No. At Barry, Illinois, it was changed to a joint railroad agent. I believe I specified that. I do not know the name of the man.

Mr. Crawford: That was the purpose of my question. At Barry, he said it changed from a merchant agent to a joint, and I wondered if any of these others so far had been changed.

Mr. Long: He will be glad to answer your question on that.

A. Those two changes I mentioned are the only changes. At Delavan, Illinois, we operated a merchant commission agency. Harry H. Creager, C-r-e-a-g-e-r, is our agent. He operates an ice company in that locality. In March 1946, 426 shipments were handled and in March 1948, 358.

At Edwardsville, Illinois, we operate a merchant commission agency. G. W. Buckles, B-u-c-k-l-e-s, is our agen He operates a storage warehouse and a drayage busines and has a substantial investment in those businesses.

Q. When you made your survey, did you inquire of M Buckles as to the investment he had in his business?

A. Yes, sir.

1635 Q. In fact, did he furnish you with any information.

A. No. He considered that a personal matter.

Q. In fact, did he furinsh you with any informatio you asked for?

A. No, he did not.

Examiner Funk: Mr. Long, I have before me the prio service file of Mr. Buckles, in which he is referred to as contract agent. Is your interpretation of the term contrac agent the same as that of merchant agent?

Mr. Long: For the record, I must say again that ou company is a consolidation of a number of express companies in which certain terms were used having variou shades of meaning among the different express companie Now, what the circumstances were which brought about th naming of this man as a contract agent, I don't know, an I don't know what our people had in mind when they calle him a contract agent.

A. In March 1946 2,240 shipments were handled at tha office, and in March 1948, 1,605 shipments.

At Grand View, Indiana, we had a merchant commissio agency. Our agent is V. Porter, an employee of a bus lin In March 1946, we handled 62 shipments at that office, an in March 1948, 22 shipments were handled.

At Griggsville, Illinois, we operate a merchant commission office. Our agent is C. F. Stone, who operates a collection agency and is city clerk. In March 1946, 362 shipments were handled, and in March 1948, 203 shipments.

At Hatfield, Indiana, a merchant commission agency i operated. C. Redmon, R-e-d-m-o-n, is our agent. He i the postmaster of that city or town. In March 1946, 32 shipments were handled, and in March 1948, 14 shipments were handled.

At Hidalgo, Illinois, H-i-d-a-l-g-o, a merchant commission agency is operated. R. O. Davison, D-a-v-i-s-o-n, is our
agent. He operates a retail grocery and notions store,
1636 and is a dealer in poultry and eggs, and is also the
village treasurer. He informed us that he had approximately $2,500 invested in the business. In March 1946, 112 shipments were handled, and in March 1948, 80 shipments.

At Mt. Sterling, Illinois, a merchant commission agency is operated. Wilma Mehl, M-e-h-l, is our agent. She operates a drayage line, and stated that she had approximately $1,600 invested in that business. She is assisted with the express work by two people, two employees, Clell, C-l-e-l-l, Juquesh, J-u-q-u-e-s-h, and Marjory Mehl, M-e-h-l. In March 1946, 765 shipments were handled at that office, and in March 1948, 560 shipments.

Mr. Crawford: May I ask at this point, is it only where you state that they have assistants that are the only places that have assistants?—In other words, in the last place, I notice you say she has two assistants, and in some other you said he had six assistants, but in some others you did not state.

Q. That is insofar as you know, I take it.—Now, this information that you have furnished is predicated upon the company's records as to the agent and information which you yourself received from the agent himself?

A. That is correct.

Examiner Funk: In your official capacity, working for the Express.

The Witness: Yes, sir.

Q. So that there may be instances where some of these agents had assistants of which you have no knowledge. Is that true?

A. That is correct.

Examiner Funk: One question, Mr. Long. I notice tha Mr. Lace is referring to the month of March. Are you usin the month of March for the same reason that you chos March at the time of the original hearing?

Mr. Long: Yes, we have. I suggested that we use tha same month.

1637 A. At Modesto, Illinois, a merchant commissio agency is operated. At that time, Carl Farmer, wh operated a grocery store and was a buyer of farm produce was our agent. He stated that he had approximately $4,00 invested in that business. That office has now been transferred to J. C. Gray, who is also a merchant agent, but I do not have information as to the date of the transfer o the business in which Mr. Gray is engaged. But he is our merchant agent at that office. In March 1946, 27 shipments were handled at that office, and in March 1948, 23 shipments.

At Newberry, Indiana, we operate a merchant commission agency. Mr. C. M. Westfall is our agent at that point. In March 1946, 230 shipments were handled, and in March 1948, 156.

Examiner Funk: That is the Mr. Westfall who has previously testified?

The Witness: That is the one.

A. At Newton, Illinois, we operate a merchant commission agency. I. W. Hutson, H-u-t-s-o-n, is our agent. He operates an insurance agency in that town. In March 1946, 917 shipments were handled, and in March 1948, 606 shipments.

At Petersburg, Illinois, we operate a merchant commission agency. R. M. Primm, P-r-i-m-m, is our agent. He operates a drayage line, and stated that he had approximately $1,000 invested in that business. In March 1946, 746 shipments were handled, and in March 1948, 577.

At Poseyville, Indiana, a merchant commission agency is operated. C. R. Schaffer, S-c-h-a-f-f-e-r, is our agent. He operates a drug store, and stated that he had approximately $10,000 invested in that business. He has a partner by the name of William A. Schaffer, who assists to some extent with the express work. In March 1946, 273 shipments were handled, and in March 1948, 129.

At Stewartsville, S-t-e-w-a-r-t-s-v-i-l-l-e, Indiana, we operate a merchant commission agency. Alta, A-l-t-a, Staley,
S-t-a-l-e-y, is our agent. She is postmaster at that
1638 point. In March 1946, 10 shipments were handled,
and in March 1948, 1 shipment.

At Wheeler, Illinois, we operate a merchant commission agency. John A. Leturno, L-e-t-u-r-n-o, is our agent. He is also postmaster at that point. In March 1946, 51 shipments were handled, and in March 1948, 31 shipments.

Those constitute the merchant commission offices in Central Illinois Division.

By Examiner Funk:

Q. Mr. Lace, do any of these merchant agents concerning whom you have testified receive any rights or privileges as employees of Railway Express Agency?

A. No, they do not.

Q. Does the Express Agency pay the rent on any of the premises occupied by any of these merchant agents concerning whom you have testified?

A. Yes. The Express Agency pays $10 per month rent at Chenoa, Illinois, for the premises occupied for express work in the building which is owned jointly by the two railroads which serve that community.

Q. What are those railroads?

A. The T., P. & W., and the G., M. & O.

Q. Is that a depot?

A. A passenger station, yes.

Q. Is the merchant agent at Chenoa engaged in any other railroad activity?

A. No, he is not.

Q. Does the Railway Express Agency furnish telephon for any of the merchant agents in the territory concerni which you have testified?

A. To my knowledge, no.—There is another office which we pay the rent, at Mt. Sterling, Illinois. We p $10 per month rent for the premises in which the mercha agent conducts the business.

By Mr. Long:

Q. To whom is that paid, Mr. Lace?

A. To an individual—not the merchant agent.

1639 Q. That is $10, you say, per month?

A. Sorry. That is $13—$10 at Chenoa.

Examiner Funk: At this time the Examiner would li to state that he has received a sworn affidavit signed Lynn P. Simpson, whom you have identified as the m chant agent at Carrollton, Illinois. This sworn affida will at this time be taken into the record as an exhibit f identification purposes and for whatever value it may determined to give, and will be assigned No. XIX.

(A sworn affidavit dated August 3, 1948, signed by Ly P. Simpson, was received in evidence and marked EXHI IT NO. XIX.)

Examiner Funk: Would you like to see this, Mr. Lon

(Exhibit No. XIX was handed to Mr. Long.)

By Examiner Funk:

Q. Mr. Lace, in the territory regarding which you ha testified, do you have any merchant agents paid on a co mission plus basis?

A. Some of them are paid commission plus a fixed s for handling work such as pickup and delivery service.

Q. Is that true of the merchant agency at Carrollt Illinois?

A. That is true of that agency.

Q. Can you tell us a little bit about Mr. Simpson's experience with the Railway Express Agency?

A. Yes. Mr. Simpson has been our merchant agent at Carrollton for many years, and I understand his father was our agent at that office at one time.

Q. Do you know whether or not Mr. Simpson was ever employed as a regular employee of the Express Agency in any other capacity?

A. I am quite positive that he was not.

Q. When did Mr. Simpson take over his agency, do you know?

A. I think I can tell you that.—Well, he stated in 1946 that over fifteen years ago he took over the agency.

(Remarks off the record, at Mr. Hassenauer's request.)

Q. Mr. Lace, do you know of your own knowledge
1640 whether Mr. Simpson has ever performed any express
service as an employee for any predecessor companies of the Railway Express Agency?

A. I am quite certain that he has not.

Q. Do you know of your own knowledge whether Mr. Simpson has ever been employed under the Railroad Retirement and Railroad Unemployment Insurance Acts?

A. No, I do not.

Q. What are the duties performed by Mr. Simpson? Will you elucidate a little bit?

A. The work required of that agency is receipting for shipments, preparing them for forwarding, maintaining the records, handling of inbound shipments, but I do not have any knowledge as to whether or not Mr. Simpson performed any of the work.

Q. You have visited the Carrollton office?

A. I have.

Q. When you visited the Carrollton office, with whom did you deal?

A. I made myself acquainted with Mr. Simpson and had some conversation with him, and he introduced me to V ginia Imus, who is doing express report work, according Mr. Simpson's statements.

Q. Do you know who, during Mr. Simpson's term merchant agents, signs reports for his office?

A. No, I do not.

Q. Do you know whether or not the merchant agent Carrollton is required to meet any specific train?

A. At that time, it was necessary to meet two spec trains daily by either the merchant agent or someone lected by him, but I understand that office is now ser by an over-the-road truck route.

By Mr. Long:

Q. And how long has it been so served, Mr. Lace, by t truck route, do you know?

A. No, I do not know.

1641 Q. Would you say it was as much as five or months?

A. Yes.

Q. Or more than that?

A. More than that. I think that possibly sometime l year, but I don't know just when.

By Examiner Funk:

Q. What instructions, if any, were given to Mr. Si son with regard to the handling or delivery of perisha merchandise?

A. I did not give him any instructions.

Q. Were any specific times set at which Mr. Simp was required or expected to make reports and remittan to the Express Agency?

A. No.

Q. Was he ever required to make his reports or ren tances on the 1st and 15th of any month?

A. I am not certain whether there was a requirem as to the specific day in connection with offices of that nature. We generally require a monthly report, and in some instances a semi-monthly report, but as to the report being rendered on the 1st and 15th, I do not know. It occurs to me that there is a specified time, but whether it is the 1st and 15th, I do not know.

Q. Has Mr. Simpson, to your knowledge, been given any instructions with regard to when he should make remittances?

A. He may have been told not to hold over a certain amount of the Express Company's funds at the office.

Q. Do you know what that amount would be?

A. No, I do not.

Q. What equipment is furnished Mr. Simpson by the Express Agency?

A. We furnish an office safe—no, I'm not sure about that. We do furnish receipts for shipments and receipts for express charges and stationery and supplies and tariffs, and no doubt a scale, but I'm not sure of that either. I think that is about all.

1642 Q. Of your own knowledge, do you know whether or not the Express Agency has furnished Mr. Simpson with a safe?

A. No, I do not.—Wait just a minute. Maybe I can answer that.—We did furnish Mr. Simpson a safe.

Q. Has Mr. Simpson at any time been given any instructions with regard to keeping express funds separate from his own personal funds?

A. I do not know.

Q. Is it customary to give any such instructions to merchant agents of that class?

A. Not usually.

Q. Do you know of any instances in which such instructions may have been given?

A. Not to a merchant agent.

Q. Was Mr. Simpson subject to discharge by the Ra way Express Agency?

A. We could not discharge him, but of course we co discontinue the arrangement.

Q. You stated that Mr. Simpson is no longer the m chant agent at Carrollton?

A. That is correct.

Q. Will you state the circumstances under which ceased to be merchant agent?

A. I do not know.

Mr. Long: May I ask a question?

Examiner Funk: Certainly.

By Mr. Long:

Q. Do you know whether the place where the work performed at Carrollton now is the same place where was performed when Mr. Simpson was merchant agent

A. It is a different place.

Q. In the premises of the new merchant agent. Is t right?

A. That is correct.

1643 Q. So that when the arrangement with Mr. Si son was discontinued, it was necessary to find anot place in which to perform the express work.

A. Yes, sir.

By Examiner Funk:

Q. Mr. Lace, do you know of your own knowledge whe er Mr. Simpson ever signed an application for employme

A. No, I do not.

Q. Mr. Lace, are you familiar with the circumstan under which these applications for employment are ta from merchant agents?

A. Yes, sir.

Q. I noticed on the form which has been introduced h in evidence that there is a place for references. Do y know whether or not the Express Agency checks the references given on that form by merchant agents?

A. I do not know. Usually, they do not, because the merchant agent is usually a representative citizen and is well known in the community. Those references are of considerable importance when the form is used for applications for employment.

Q. Would you say, Mr. Lace, it is not customary, then, to check upon the references of merchant agents?

A. I am not sure.

Q. During the time that you were in charge of the Illinois District, did you ever have occasion to check upon the references of merchant agents?

A. No, I didn't.

Examiner Funk: I believe that is all I have to ask you about Mr. Simpson. I may have some more general questions to ask on some of the other things.—Mr. Long, do you wish to continue?

Mr. Long: Yes.

By Mr. Long:

Q. Was pickup and delivery service performed at Carrollton by Mr. Simpson's agency?

1644 A. Yes, sir.

Q. Do you know whether Mr. Simpson drove the truck or whether one of his employees drove the truck?

A. It is my understanding that one of his employees did.

Q. I believe you have testified as to the value of Mr. Simpson's business, which was reported to you by him.

A. Yes, sir.

Q. And how much was that?

A. $70,000.

Q. I believe also you described the various businesses in which Mr. Simpson was engaged at Carrollton.

A. Yes, sir.

Q. Do you know what the average man hours per day were required in the operation of Mr. Simpson's agency?

A. I would estimate it would be from three to five hours per day.

Q. Do you know whether Mr. Simpson paid any Social Security tax on the wages of his employees?

A. He stated that he did.

Q How was Mr. Simpson paid for the work performed at his agency for Railway Express?

A. On a commission basis plus a fixed sum for work performed in connection with pickup and delivery service.

Q. Do you know who paid for the telephone at Mr. Simpson's agency?

A. Mr. Simpson.

Q. Do you know in what names, if any, the telephone was listed?

A. In the names of his businesses.

By Examiner Funk:

Q. Mr. Lace, in your capacity as an official of the Express Agency, when you were in charge of the Central Illinois District, would you have had occasion to know whether or not the merchant agents had at any time previous thereto been employed either by the Express Agency or
1645 one of its predecessor companies or by the transportation industry generally?

A. No. He could have been so employed and the records of that office would not show it.

By Mr. Long:

Q. That is, the records of your office wouldn't show whether or not he had been employed by another carrier, but they would show if he had been employed by Railway Express. Is that true?

A. The records in the superintendent's office might not show that, but we have other records that would show that.

Q. And where would those records be maintained, if you know?

A. No, I do not.

Q. Do you have in mind the possibility of employment in a division other than the Central Illinois Division, and that is the reason for your answer?

A. Yes, sir.

Q. In other words, Central Illinois Division would maintain records of employees in that division only.

A. Yes, and he could have been employed by some other department.

Q. I see. But insofar as your division is concerned, this man was not employed. Is that correct?

A. That is correct.

Q. Mr. Lace, you heard the testimony of Mr. Horton, the testimony of Mr. Westfall, the testimony of Mr. Schrieber, and the testimony of Mr. Jordan. Could you say from your experience in the express business that those gentlemen were typical of the general pattern of merchant agents who perform work for Railway Express Agency as merchant agents?

A. Yes, I think they are typical of the general pattern.

Mr. Long: I have no further questions.

Examiner Funk: Mr. Hassenauer?

* * * * *

1647 Q. Can you tell me, Mr. Lace, just what practice was adopted by merchant agents— For example, this man Simpson with whom you dealt considerably in your testimony, makes remittance to Railway Express Agency of the monies collected by him in the handling of express.

A. Your question is just how is it taken care of?

Q. Yes, sir.

A. We supply what we term remittance envelopes. The merchant agent places the money in the envelope, ad-
1648 dresses it to our assistant treasurer, and obtains

a receipt for the envelope from the messenger or trucker who serves his office. I might qualify that, that in some few instances, where perhaps the only service to the town is a freight line, some agents are permitted to send their remittance by U. S. Mail. Those, of course, are instances where the amount of business is very, very small and consequently the amount of the remittance is very small.

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1649 MR. PAUL GROSS, JR., a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Long.

Q. Mr. Gross, will you give us your full name and address for the record?

A. Paul Gross, Jr., 817 South Wells Street, Chicago, Illinois.

Q. You are the General Auditor for Railway Express Agency, having your office in Chicago?

A. I am.

Q. You have testified previously in this case, have you not, Mr. Gross?

A. I did, at the two earlier hearings.

Q. Are you acquainted with the manner in which were prepared exhibits entitled "Railroad Unemployment Contributions and Income Re Merchant Agents Individually For 1943, 1944 and 1945," and entitled "Railroad Unemployment Contributions and Income Re Merchant Agents Individually Through 1942," and "Railroad Retirement Taxes and Income Re Merchant Agents Individually Through 1942," and "Railroad Retirement Taxes and Income Re Merchant Agents Individually for 1943, 1944 and 1945?"

A. I am.

Q. Will you please describe the manner in which those exhibits were prepared?

A. These exhibits contain information with respect to individuals whom the Agency has considered as merchant agents and in connection with whom Railway Express Agency reported to the Railroad Retirement Board information as to the compensation earned by those merchant agents during the years specified in the exhibits.

By Examiner Funk:

Q. It also refers to assistants, does it not?

A. It does. It shows also the compensation paid
1650 to assistants as reported by the merchant agents,
and upon the compensation of whom the retirement taxes were withheld. The information as to who were merchant agents was obtained from our operating department superintendents — that is, the superintendents throughout the United States furnished the accounting department with the names of the individuals considered as merchant agents. We then referred to our reports to the Retirement Board and produced the statements forming the exhibits to which we are referring, to obtain the compensation, the gross compensation and the net compensation, and also the amounts of income tax withheld, which were paid on the basis of the amounts of compensation reported for the various years.

Each of the books of exhibits are numbered with sheet numbers prefixed by the letters A, B and C. The individuals shown upon the sheets prefixed "A" are located in the eastern operating departments of the company, comprising generally the territory east of Pittsburgh and north of Washington, D. C. The individuals reported on sheets prefixed "B" are located in the territory generally west of Pittsburgh, north of the Ohio and Missouri Rivers, and west of the states of Kansas and Oklahoma, to the Pacific Coast. The individuals reported on sheets prefixed "C" are located generally south of Washington, south of the Ohio and Missouri Rivers, and east of the western boundary line of the states of Kansas and Oklahoma, including the state of Texas, incidentally.

A little difficulty seems to have been experienced in the last two days in locating some of the names of individuals referred to, principally in the state of Illinois. That was because some of the offices in the state of Illinois and in Indiana are within the so-called central departments, which are north of the Ohio and Missouri Rivers, and some of the offices of those two states, for example, are located in the operating departments generally south of those two rivers. So that for the state of Illinois, we might refer to them as
split states, and some of the Illinois agents will ap-
1651 pear on these sheets prefixed "B" while others would
appear upon sheets prefixed "C". That is, where
the numbers are prefixed by those letters.

Q. Mr. Gross, do you have any other split states?

A. Yes, there are—Kansas, Missouri, Texas. In Texas, for example, El Paso and a few offices in Texas in the vicinity of that city are in the Pacific departments, which are reported under "B," whereas the remaining offices in the state of Texas would be in the southwestern departments and would appear on sheets prefixed "C." Pennsylvania is a split state. The lines west of Pittsburgh, although within the state of Pennsylvania, are in the central departments. I think those are the principal split states.

By Mr. Long:

Q. Mr. Gross, our attention has been directed to some instances showing in those exhibits of agencies where there is a possibility of error, and because thereof, is it the desire of Express Agency to make a check of such exhibits?

A. Instances of that kind have been called to our attention, and it is our intention to revise these exhibits so that we may have absolute correct statements to show the individuals we consider as merchant agents and to show the complete information as to such merchant agents and to verify the correctness of the amounts of commission paid to those agents. In some cases it developed that agents had been considered as merchant agents and the classification of the office had been changed to where they may have become joint railroad-express agents or where they may have become exclusive commission agents.

Mr. Hassenauer: Mr. Examiner, I'd like to interrupt just one minute here. In Mr. Lace's testimony—I just want to make one thing clear—I think he testified that this merchant agent at Carrollton, Illinois is paid an amount in addition to his commissions. Is that correct?

Mr. Lace: Yes.

1652 Mr. Hassenauer: Now, that is not reflected in the gross income set forth in this exhibit. In looking at Mr. Simpson's gross income, I noticed just a lump sum. There was not set forth anything in addition to that, indicating that he did have another agreement with respect to some stipulated amount which he received in addition to the express commission.

The Witness: Am I to answer that question? Is the question directed to me?

Mr. Hassenauer: I'd just like to ask. I'll put that to Mr. Long.

Mr. Long: I think we will bring that out in these exhibits, Leo. These exhibits show the income received at that office for representing Express Agency including pickup and delivery of express shipments, flat payment of $50 per month, and I understand that that is reflected in those exhibits.

The Witness: That is correct.

Mr. Hassenauer: Well, of course, you use the heading "Gross Express Agency Commissions." You do not set forth that he receives any compensation in addition to the commissions which you have set forth.

The Witness: Any sums which we would pay to the agent, either as a fixed allowance or as determined on a commission basis, would be commissions. We consider that as commission and it is included in here.

Mr. Hassenauer: That answers the question. Thank you.

By Mr. Long:

Q. Mr. Gross, I show you Form 7050, covering the merchant agency at Carrollton, Illinois for the month of November 1946, and ask you if that is the original record taken from the records in your office.

A. It is.

Mr. Long: May I offer that in evidence.

Examiner Funk: That will be accepted in evidence as Exhibit No. XX.

1653 (Railway Express Agency Form 7050, covering November 1946 at Carrollton, Illinois, was received in evidence and marked EXHIBIT NO. XX-A.)

Q. Now I show you Exhibit XX-A, that being the exhibit concerning which you just spoke, and ask you to explain the numbers in red pencil thereon.

A. I think perhaps I shall have to go in back of the preparation of this Form 7050 somewhat to make that explanation of the red figures. All commission agents and all other agents are required to submit monthly, or more frequently in the case of the salaried offices, a monthly balance sheet. Among the information shown on the balance sheet are the amounts of revenue upon which the agent's commissions are based. The balance sheet shows also in one section the computation of the commission to which the agent is entitled. These forms 7050 are prepared by the agents, and the first figure, for example, the "Commission or fixed allowance claimed on agency balance sheet," in this case the sum of $68.32, as originally shown by the agent, Mr. L. P. Simpson, was taken from the balance sheet. The 7050 forms, as I started to say, are forwarded to the district accounting bureaus with the balance sheets. I should explain perhaps that district accounting bureaus are a subdivision of our accounting department, in which we audit the agent's accounts. They are the Agency accounting bureaus associated with the general accounting department District accountants report to the general auditor.

In the auditing of the agent's balance sheet, we find errors of one sort or another, errors in addition or errors in extensions, perhaps errors in calculation of commission. The red figure which appears on this Form 7050, the first item of $68.42, as against $68.32 entered by the agent, indicates that his commission was 10¢ greater than he had claimed, and in order to make proper payment and withholding of retirement taxes and unemployment insurance taxes, we would correct those sums and adjust the amount of tax. We will make any other adjustments
that may be necessary on Form 7050 as a result of
1654 any errors made in the record. The difference in this
particular case was only 10¢ and did not affect the
amount of Railroad Retirement tax.

Q. I show you what purports to be original 7050 covering Carrollton, Illinois for the month of October 1946, and ask you if that is the original of such record taken from your office.

A. It is.

Mr. Long: I offer that in evidence as Exhibit No. XX-B.

(Railway Express Agency Form 7050, covering October 1946 at Carrollton, Illinois, was received in evidence and marked EXHIBIT NO. XX-B.)

A. I might say in this particular case a correction in red pencil appears on this form. That was made at the time the records of the agency were audited. In this particular case it did affect his Railroad Retirement tax to the extent of 3¢.

Q. Increase?

A. Yes, sir.

Mr. Long: Now, may I substitute these copies for the exhibits?

Examiner Funk: Have these been certified to?

Mr. Long: We will certify them.

(Certified copies of Exhibits No. XX-A and XX-B were substituted for the original forms offered in evidence.)

Q. I show you what purports to be original 7050 covering the agency at Carrollton during the month of May 1948, and ask you if that is in fact the original abstracted from your files.

A. It is, and the red pencil markings upon the document indicating the errors that were made are developed in the auditor's report.

Mr. Long: I offer that in evidence as XX-C.

(Railway Express Agency Form 7050, covering May 1948 at Carrollton, Illinois, was received in evidence and marked EXHIBIT NO. XX-C.)

* * * * *

1655 Q. I show you Exhibits No. X-A, B and C, and
ask you if they are original forms 7050 covering the
agency at Nauvoo, Illinois, for the months of October 1946,
November 1946, and May 1948, abstracted from the
1656 records in your office.

A. These are the original forms 7050 for the office at Nauvoo, Illinois, for the months of October and November 1946 and the month of May 1948. They are the original records taken from the files in my department.

Examiner Funk: Is your explanation with regard to the red figures thereon the same as given previously in regard to other forms 7050?

The Witness: That is correct.

Mr. Long: That is all.

Examiner Funk: Do you have any questions of Mr. Gross?

Mr. Hassenauer: No.

Mr. Morgan: No.

Examiner ~~Funk:~~—I have one question, Mr. Gross, I would like to have in the record.

By Examiner Funk:

Q. You are the same Mr. Gross who testified here previously?

A. That is correct.

Q. In your testimony on the re-hearing, you referred to Exhibit 15 which had been introduced at the original hearing, showing a number of joint railroad-express agencies receiving varying amounts of commission for the month of March 1937.

A. That is correct.

Q. At the re-hearing you also introduced Exhibit No. 1-A, showing the number of merchant agents who served the railroads and Express Agency receiving varying amounts of commissions for the month of March 1937.

A. That is correct.

Q. You also introduced at the re-hearing Exhibit No. 2-A, showing other activities of merchant agents who served the railroads and the Express Company.

A. That is correct.

Q. Mr. Gross, in the exhibits concerning which you have
testified, being the lists of merchant agents and their
1657 assistants, showing the compensation received, are
there included in those exhibits the individuals referred to in your Exhibit No. 1-A as introduced at the re-hearing?

A. They are, or were intended to be.

Q. Is it the position of the Express Agency that thos individuals are merchant agents, as stated at the re-hearing?

A. That is correct.—You are confining your questio entirely to the merchant agents whom we have considere as merchant agents, who served the railroads and th Express Agency?

Q. Yes. You will recall, I believe, that at the re-hearing, Mr. Gross, you stated that these individuals had bee included originally in Exhibit No. 15 at the first hearing

A. That is right.

Q. Then you include in your list of merchant agent some individuals who perform work in the railroad industry.

A. That is correct. That is to say that they are merchant agents engaged in some other business and probably their principal activity, and they incidentally serv the Express Agency as agent and also in some manne serve the railroads.

Q. Your statement then is that the merchant agent listed in your Exhibits 1-A and 2-A, referred to at th re-hearing and there introduced, include some individual who also performed service as agents for the railroa companies.

A. They are all of that character.

Q. Well, not all of them, I believe you testified, wer agents. Some performed other types of railroad work You said some of them may be caretakers.

Mr. Long: Yes, that is correct.

Examiner Funk: That is all I have.

1658 *Cross-Examination by Mr. Hassenauer.*

Q. Mr. Examiner, while we are on that point, I'd like to interpose a question here. You recall, Mr. Gross, that on your cross-examination by me, you stated that you were not in a position at that time to specify in detail the nature of the work that these merchant agents were performing for railroads.

A. I think that is correct, Mr. Hassenauer.

Q. Yes. Are you prepared at this hearing, or in the adjourned hearing, to specify in detail the nature of the work performed by these merchant agents for the railroads?

A. All of them.

Q. Well, I think you should, in order to assist the Board here to determine the issue.

A. I think that can be developed. It is time consuming.

(Remarks off the record, at Mr. Hassenauer's request.)

A. I know of cases where a merchant agent who is engaged principally in some other activity outside of the railroad industry, who serves the Agency as a merchant agent, may sell tickets for a railroad line. It may be an electric line; it may be a steam railroad line. I wouldn't be able to say offhand just what ticket agency may be in that category, but I do know there are some, and I would not know what particular railroad would be involved. It may not be a carrier under the Railroad Retirement Act.

By Examiner Funk:

Q. Mr. Gross, at the previous re-hearing in Jurisdictional Docket No. 2, Mr. Hassenauer, I believe, asked you whether the stations at which these merchant agents performed their services have any telegraph service, and I believe you answered, according to the record, "Generally, that is so." Are you still of that opinion?

A. I think, generally, the railroad stations whe 1659 we may have the merchant agents in the st tion—I think generally there is a telegraph operat at that station.

Q. Are there any instances in which the merchant age also performs the duties of telegrapher?

Mr. Long: If he does, we concede that he would be joint agent, and we are eliminating all of those people fro this claim. In fact, we are eliminating all people fro this claim who are full time employees of any railroa We are eliminating from this claim any individual who under the scope rule of the agreements Express Agen has with the Telegraphers. And from my investigati made of the merchant agents in 1946, through the Tele raphers, I frankly state that in the majority of cas where the agent also represented a railroad, it was usual as caretaker. In one or two cases, it is my recollectio the man was some sort of a pumper, whose railroad wo consumed one or two hours a day. They were not by f full time employees of any railroad.

* * * * *

1665 MR. LIONEL G. McADAM, a witness produced the Railway Express Agency, having been fir duly sworn, was examined and testified as follow

Direct Examination by Mr. Long.

Q. What is your full name, Mr. McAdam?

A. My name is Lionel Grant McAdam.

Q. And what is your address?

A. 42 South Cherry Street, Galesburg, Illinois, is n business address.

Q. And you are a route agent in the employ of Railw Express Agency, Incorporated?

A. Yes, I am.

1666 Q. When did you begin your service with Railway Express Agency?

A. I entered the service of the American Railway Express Company at Beloit, Wisconsin, as a freight caller, on September 1, 1920.

Q. Will you detail your experience as an express employee?

A. I held various positions at Beloit, and in February of 1926 I was appointed agent at Des Plaines, Illinois. In January of 1933, I was appointed agent at Alton, Illinois. In February of 1941, I was appointed traveling commercial agent, with headquarters at Des Moines, Iowa. On January 1, 1943, I was made route agent in the Nebraska Division at Lincoln, Nebraska.

Q. Lincoln was your headquarters, was it?

A. Lincoln was my headquarters. I transferred to the Western Illinois and Eastern Iowa Division in August of 1943, and am at the same location at present.

Q. I take it then that your service with the Express Agency and its predecessor, American Railway Express, has been continuous.

A. It has been continuous. That is true.

Q. Now, you said that you are now route agent at Division 45, did you?

A. That is correct.

Q. And what does Division 45 cover?

A. Roughly, from Chicago on the east to Davenport, Iowa on the north, roughly to the southern tier of counties in Wisconsin, to Peoria, Illinois, on the south.

Q. Is that division known as the Western Illinois and Eastern Iowa Division?

A. That is right.

Q. How many agencies are there in the territory that you cover as a route agent?

A. I have 132 offices.

Q. And how many of those are joint agents with a railroad?

A. There are 112 of these offices are joint with a railroad, 12 of them are salary offices, there are 2 exclu-
1667 sive commission offices, and 6 merchant agent offices

Q. Now, where are those 6 merchant agent offices located?

A. At Good Hope, Illinois, Sciota, Illinois, Blandinsville, Illinois, La Harpe, Illinois, Warsaw, Illinois, and Nauvoo, Illinois.

Q. Did you mention Sciota?

A. That is right.

Q. Now, Mr. McAdam, are you acquainted with the General Rules and Instructions?

A. I am.

Q. You have been a route agent for how many years?

A. Since January 1, 1943.

Q. And during that period of time you have acquainted yourself with those General Rules and Instructions which apply to merchant agencies?

A. I have.

Q. I direct your attention to Rule 818 of the General Rules and Instructions, reading: "Employes must register their places of residence and telephone numbers at the office where employed or located, and report at once in writing any changes therein," and ask you if that rule applies to merchant agencies?

A. No, it does not.

Q. I direct your attention to Rule 820 of the General Rules and Instructions, reading: "No employe is permitted to delegate to another person any portion of his duties, unless authorized to do so by his superior officer," and ask you if that rule applies to merchant agents.

A. No, it does not.

Q. I direct your attention to Rule 825 of the General Rules and Instructions, reading: "All employes, other than cashiers, must settle in full to agent, cashier or other designated employe at the close of each day's business," and ask you if that rule applies to merchant agencies.

A. No, it does not.

Q. I direct your attention to Rule 827 of the General Rules and Instructions, reading: "The personal conduct and deportment of employes must be such as to 1668 reflect credit upon themselves and on the Company, and their personal appearance should be neat, clean and orderly. When on duty they should wear such uniform as may be required." Does that rule apply to merchant agencies?

A. No, it doesn't.

Q. Are merchant agents required to wear uniforms?

A. No, they are not.

Q. Are merchant agents required to wear a badge?

A. They are not.

Q. Are any of the employees, assistants or helpers of merchant agents required to wear a uniform or a badge?

A. No.

Q. How many merchant agents in your territory perform pickup and delivery service?

A. I have only one in my territory—Nauvoo, Illinois.

Q. That is Mayor Horton, I take it.

A. Yes, sir.

Q. Now, does he carry a sign reading "Railway Express" on the side of his truck or anywhere on his truck?

A. No, he doesn't.

Q. Do you have anything whatever to do with the manner in which his truck is driven?

A. No, I haven't.

Q. Or the route which it follows in making pickups or deliveries?

A. No.

Q. Who has the exclusive control of those things in the Nauvoo agency?

A. The merchant agent, Mr. Horton.

Q. Do you have a key to any merchant agency?

A. No, I do not.

Q. Now, who takes care of the repairs to this pickup and delivery truck?

A. The merchant agent.

Q. Who determines where the repairs are to be performed?

1669 A. The merchant agent.

Q. And who pays for the gasoline?

A. Mr. Horton—the merchant agent.

Q. And all other expenses having to do with the truck?

A. Mr. Horton pays it.

Q. Has Express Agency anything whatever to do with those matters?

A. Nothing whatever.

Q. Do you have a key to any merchant agency in your territory?

A. I do not.

Q. Do any merchant agents in your territory have a telephone?

A. They all have telephones.

Q. Do you know who pays for the telephones?

A. In each case the merchant agent pays for it.

Q. Do you know whether Railway Express Agency is listed in the telephone directory in any merchant agency in your territory?

A. The Railway Express is not listed in any of my merchant agent offices.

Examiner Funk: Have you had occasion to examine the telephone directories in those towns?

The Witness: Yes, sir. I know that they are listed under the name of the individual operating the agency.

Examiner Funk: Proceed.

Q. You were here when Mr. Horton testified, were you, Mr. McAdam?

A. Yes.

Q. And was his testimony in accordance with the facts as you understand them?

A. Yes, sir.

Q. Are any bulletins or letters ever addressed to the merchant agents in your territory?

A. Yes, sir.

Q. And what do those letters and bulletins usually refer to?

A. Well, they refer to various subjects, sometimes em-
bargoes on areas where service may be cut off by
1670 flood, sometimes quarantines on livestock or nursery
stock in certain areas. It may be changes in the state
or federal regulations as to the handling of livestock, nursery stock, meat products, liquor, or various other subjects along that line.

Q. Would you say then that such circular letters and bulletins refer to specifications as to the work which is to be done at those agencies?

A. That is correct.

Q. Did you hear me read what we mean by the use of the term "specifications?"

A. I did.

Q. And is that the meaning that you attribute to it when you answer my question?

A. Yes, it is.

Q. Do you know the average number of shipments per day handled at Nauvoo?

A. On the average of probably 8 or 10.

Q. At Warsaw?

A. Possibly 10 or 12.

Q. Good Hope?

A. At Good Hope, 3 or 4.

Q. Sciota?

A. Seoita, 2 or 3.

Q. Blandinsville?

A. I would say about 10 average, daily.

Q. La Harpe?

A. Possibly 12 or 14 daily at La Harpe.

Q Are merchant agents granted a paid vacation?

A. They are not.

Q. Do they ever take time off from their work, as far as you know?

A. Yes, there have been occasions when they have taken time off.

Q. And do you know who of those agents have taken time off?

A. Ray Smith, the agent at Good Hope, and Ferguson, the agent at Sciota, Illinois.

1671 Q. And what arrangements were made when these agents took time off?

A. They arranged to have some of their employees take care of the work.

Q. Well, now, how did you find out that these agents were off? Did they tell you that, or how did you know?

A. I had no advance notice in the case of Mr. Smith at Good Hope. I happened to call at the agency while he was on a vacation.

Q. And what did you find at that agency when you called?

A. His employees were handling the express traffic.

Q. How many employees has he, do you know?

A. I couldn't state accurately. I would say two or three. It seems to vary from time to time.

Q. Do you know whether any or all of them perform express work at that place?

A. I think they all do, on occasion.

Q. Are the joint agents granted a paid vacation?

A. Not by Railway Express Agency.

Q. Are they by the railroads?

A. They are.

Q. When a joint agent takes a vacation, what arrangements are made, if you know?

A. The railroad employing him sends in a relief agent.

Q. And is the relief agent a regular employee of the railroad?

A. That is right.

Q. Is he what they sometimes refer to as a "swing" agent?—I don't know whether that is a correct term or not.—Or don't you know?

A. I don't believe that, to my knowledge, "swing" men are necessarily vacation relief men on the railroads.

Q. I think I am in error there.—Now, these joint agents are six day a week workers, are they?

A. In most cases.

Q. So that each has a day off a week. And who relieves them from their duties when they have their weekly day off?

1672 A. Smaller agencies are usually—

Q. These are the joint agencies we are speaking of.

A. Will you repeat that question?

Q. Well, maybe we had better ask it this way. Do you know anything about what is called a swing relief agent?

A. Yes, I do.

Q. Will you tell us what that term means—that is, swing relief agent?

A. Well, when a joint agent occupies a seven-day position, he is usually relieved one day per week by a swing relief agent.

Q. And this swing relief agent covers how many agencies?

A. He would cover six.

Q. So that he has one day off a week, too.

A. Yes, sir.

Q. Does this swing relief agent take care of the express work while he is on duty at an agency where express work is performed by a joint agent?

A. He does.

Q. Now, how does this swing relief man obtain a job, if you know?

A. By bulletin, I believe.

Q. That is, by bidding on it?

A. Correct.

Q. And he is a regular employee of the railroad?

A. Yes, sir.

Q. What, if anything, do you do in the event you find a joint agent improperly handling express business?

A. I point out the correct way and try to persuade him to follow it.

Q. And what if he continues to handle the express work improperly?

A. I would have to report the facts to my superintendent, who in turn would no doubt handle it with the railroad superintendent over that office.

Q. Now, have you any merchant agents in your territory who have not been doing all the work which is expected to be done at a merchant agency?

A. I have two that will not make out the monthly reports.

1673 Q. And with respect to them, what have you done?

A. I go down there each month and make them out myself.

Examiner Funk: Will you identify those, please?

Witness: Those are the offices of Good Hope, Illinois, and Sciota, Illinois.

Q. Have you ever found cause to complain about the work of any merchant agent in your territory?

A. Other than that, no.

Q. Have you ever reported to your superintendent the fact that you have been obliged to make out these reports for these two merchant agents?

A. No, I have not.

Q. And what is your reason for not so reporting it?

A. We have a peculiar situation at these two offices. A number of farmers in this area around these two towns raise blooded hogs and ship and receive stock during certain seasons of the year, and it happens to be that most of these agents are garage men. They have garage premises where there are facilities to unload hogs in the back of the garage awaiting our truck to pick them up later in the afternoon. Both towns are small, and there are no other businessmen who have buildings that are suitable to handle our traffic.

Q. That is, to handle hogs?

A. That is right. We can't very well handle shipments of that type in a grocery store or ice cream parlor or types of businesses of that nature.

Q. How are these merchant agents in your territory paid for the work that they have performed for Railway Express?

A. In each case, they are paid 10% of the business they do.

Q. Well, now, that is for the handling of the agency. Is Mr. Horton paid anything in addition for the handling of pickup and delivery service?

A. Mr. Horton is paid in addition to the 10% commission an allowance of 8¢ per shipment.

Examiner Funk: Mr. Long, the other day you had
1674 occasion to refer to some merchant agents as commission plus.

Mr. Long: Yes.

Examiner Funk: Perhaps, Mr. Long, you should define commission plus.

Mr. Long: I would say that a commission plus merchant agency is one where the agent is paid a percentage or commission of the express revenue received at his station plus a stated sum per month or a stated amount per shipment for the performance of some service such as pickup and delivery service or for the furnishing of some facility.

Examiner Funk: Do you have any agents of that category?

Witness: Nauvoo is paid 8¢ per shipment.

Mr. Morgan: In addition to the 10%.

Witness: In addition to the 10% commission.

* * * * *

By Examiner Funk:

Q. Mr. McAdam, with respect to the merchant agents in the territory which you are over, does the Express Agency pay any rental for any of the premises occupied by them?

A. No. In each case the merchant agent furnishes the space to handle our business.

Q. What equipment do you furnish the various merchant agents in your locality?

A. They are furnished with a complete set of tariffs, a copy of the General Rules and Instructions, a copy of the accounting instructions; they are furnished with the necessary receipt forms, report forms, address tags, address labels, glue, glue brush, and in some cases a set of counter scales and a platform scale, and in other cases merely
1675 a platform scale.

Q. Are any of them furnished with safes?

A. Not in my district.

Q. Are any of them furnished with pistols?

A. No, sir.

Q. You referred to some accounting instructions. Do you have accounting instructions separate from your General Rules and Instructions?

A. Yes. The accounting instructions are General Accounting Instructions 93-A, for commission offices.

Mr. Long: Do you want those too?

Examiner Funk: Yes.

Mr. Long: We will get them for you.

* * * * *

1685 Examiner Funk: In my capacity as Examiner, I have also received a sworn affidavit signed by William C. Pearson, whose address is Ocean Park, Washington. At this time, I will mark it No. XXIV and receive it into evidence for the purpose of identification and whatever value it may have. I presume, Mr. Long, that when this hearing is resumed, you will have someone here to testify with regard to those.

Mr. Long: I surely shall. We will investigate those thoroughly for you.

1686 (Sworn affidavit dated July 29, 1948, signed by Wm. C. Pearson, received in evidence and marked EXHIBIT NO. XXIV.)

* * * * *

1704 Hearing held Monday, March 14, 1949, in Room 1230 of the Railroad Retirement Board, 844 Rush Street, Chicago, Illinois, by Examiner Omer M. Funk, in pursuance of authority granted by Board Order No. 48-229.

* * * * *

1706 Mr. Long: In accordance with your request, Mr Examiner, I shall endeavor to outline the various groups who serve as agents of Railway Express Agency. It is noted that in the Examiner's report made with respect to the hearing in this proceeding held December 15, 1937, on page 3 thereof, such individuals and others representing the Express Agency as agent were divided into six groups. There appears to be need that some of these groups be further defined and subdivided. I shall endeavor to follow the same outline as set forth in the Examiner's report, subdividing the groups.

1. Individuals, some of whom are in charge of agencies, who devote all their time to Express Agency service, and who are paid on a wage or salary basis from the regular payroll. These individuals are ~~hereinafter~~ called "exclusive employees".

2. Individuals in charge of agencies, who are granted privileges of employees, such as free transportation and paid vacations, and who are paid on a commission basis or on the basis of a stated sum per month. These have been referred to in this record as "exclusive agents", and may be subdivided as follows:

1707 (a) Those who devote all of their time to the service of the Express Agency, and who earn a net return in excess of $125 per month. These agents are subject to the Rules Agreement with the Brotherhood of Railway Clerks, and their positions are subject to bid and placed upon a roster.

(b) Agents who devote substantially all of their time to the service of the Express Agency, but who may perform some independent business of their own, and who earn net commissions of less than $125 per month. This subdivision contains but very few agents, and those who are within this subdivision generally are former salaried employees.

3. Individuals who perform service both for the Express Agency and for one or more railroad companies, and who are paid either by the Express Agency or by a railroad company on a salaried basis from the regular payroll, for both their express and their railroad service.

4. Individuals who perform service for a railroad company, for which service they are paid by the railroad company, and who also are in charge of agencies for the Express Agency for which they are paid on a commission

basis or a stipulated sum per month by the Express Agency. These individuals are called joint agents. Those joint agents who have been paid on a flat monthly basis have sometimes been referred to in Express circles as fixed-allowance agents.

5. Individuals who act as caretaker or custodian of a railroad station where the sale of passenger tickets has been discontinued and freight service has been limited to no more than the receipt of inbound prepaid shipments, and who operate the Express office in the station and are paid by the Express Agency on a commission basis or a stipulated sum per month. These have been referred to in Express circles as caretaker agents or custodian agents, and in some cases, where they are also merchants, as merchant agents.

6. Individuals, corporations or partnerships who, in conjunction with or in addition to some other activity
1708 entirely outside of the railroad industry, have the
Express office on premises which they control by reason of ownership or lease or rights superior to that of the Railway Express Agency. These have been designated as merchant agents and may be subdivided as follows:

(a) A merchant who conducts an independent business and at the same time carries on the Express work in his regular place of business.

(b) A doctor, priest, minister, public official, who at the institution where he is employed or engaged in some other activity represents the Express Agency as agent.

(c) A housewife who conducts her Express Agency in her home.

(d) An employee of a business not within the railroad industry who with the consent of his employer has the Express office in his employer's place of business.

There should be added to this general category that any one of these several agents is permitted to have a pa or all of the work performed by any of his designees.

Examiner Funk: You are referring to Group 6 ther

Mr. Long: Yes.—All of these agents are paid general on a commission basis, although there are some who a paid a stipulated sum per month, and there are a numb who are paid a commission in addition to a stipulated su or allowance per month.

7. Individuals, hotels, YMCA's, warehouses, reta stores, and other similar places who perform part or a of the following work in connection with the Expre business: (a) Receipt for express or baggage transfer shi ments brought to the branch agency, which shipments a picked up by the Express driver; (b) Permit undeliver express shipments to be held at his or its premises for ca by the consignee; (c) Receive calls, usually by telephon requesting that a driver of Railway Express Agency pi up a shipment at a designated address and transmit su calls to either an Express driver or agent. These we sha
designate as branch package receiving agents. I
1709 Express circles, they have been referred to as bran
agents, branch package receiving agents, sub agent
influencing agents, campus representatives, or call agent

8. Those individuals who have been referred to in o claim as "all others." It would be impracticable for th purposes of this hearing to define each category within th claim, and Express Agency is waiving the claim with r spect to them. They include janitor service, station tran fer service, the meeting of trains, and other incident work. They include policemen and individuals havi regular gainful employment in a broad variety of bus nesses. They are paid directly by Railway Express Agenc

9. Individuals who are not granted employee privilege such as paid vacations and free transportation, and wh have not been considered as employees by Railway Expre

Agency, but who, because of the particular arrangement made, operate the Express office on premises controlled by Railway Express Agency, through lease or otherwise. These are considered borderline cases by the Express Agency, and we are waiving claim as to them. Examples—such agents are C. C. Harrison of Rockville, Indiana, and Wilma Mehl, Mt. Sterling, Illinois. There are also included in this class individuals who perform Express service on railroad premises where the Express Agency may be said to have obtained the privilege of so operating the office of the Express Agency on railroad premises through the railroad. In this class should also be included those agents who have been called at various times caretaker agents or custodian agents.

10. Individuals employed by the joint agents to assist them in the performance of Express work at the office or railroad station.

11. Individuals employed by the joint agent to perform pickup and delivery service in vehicles owned by the joint agent.

12. Individuals employed by the merchant agent to assist him or to perform entirely the Express work he is required to perform pursuant to his agreement with Railway Express Agency.

13. Individuals who perform all or a part of the 1710 work the branch agent engages to perform in behalf of the Express Agency.

* * * * *

1744 MR. G. C. LACE was recalled for examination and testified as follows.

Direct Examination by Mr. Long.

Q. Mr. Lace, you testified in this proceeding last August, I believe.

A. Yes, I did.

Q. Have you read your testimony since then?

A. Yes, I have.

Q. Have you found any inaccuracies in it?

A. Yes, I did find one inaccuracy.

Q. And what was that?

A. The record shows that there were 60 exclusive commission agents in Central Illinois Division at the
1745 time I was superintendent. The correct number is 16.

Q. I direct the Examiner's attention to page 231, near the bottom.—Mr. Lace, I direct your attention to page 251 of the transcript of testimony taken in August 1948, wherein you were asked by the Examiner, "Is there any actual difference in the duties performed by the exclusive commission agent and the merchant agent?" and your answer was, "In either case, of course, it is required that all of the express work at the town be handled by the agent or someone delegated by the agent, so that there is little, if any, difference in the work. Express work is similar all over." I show you Exhibit No. XXVIII, and ask you what that is.

A. That is a Report of Public Relations and Sales Activities, which salaried, exclusive commission, and contract agents are required to prepare monthly.

Q. Now, are merchant agents furnished that form?

A. No. They are not.

Q. Are merchant agents required to fill out that form?

A. No, they are not.

Q. So that the duty of filling that form out as respects exclusive commission and so-called contract agents differs from that of a merchant agent. Is that right?

A. Yes, sir.

Q. Well, now, when you had reference to the duties of agents as testified to by you on 251, what did you have in mind with respect to express work being similar all over?

A. I had in mind receipting for shipments, the way it is received for is similar; collecting charges on a shipment, wherever it is done, is done in a similar manner.

Q. Did you have reference, then, to the specifications of the work?

A. Yes, sir.

1746 Q. Mr. Lace, by saying "specifications," are you referring to the term as defined by me at the last hearing?

A. Yes, sir.

Q. Mr. Lace, you were superintendent of what division in 1946?

A. The Central Illinois Division.

Q. And as such superintendent, did you have occasion to arrange for the filling out by merchant agents of a certain questionnaire?

A. I did.

Q. I show you Exhibit XXIX and ask you whether that is the form which you just referred to.

A. It is.

Mr. Long: May Exhibits XXVIII and XXIX be accepted in evidence?

Examiner Funk: They may.

(EXHIBIT NO. XXVIII, copy of R. E. A. Form 156, Report of Public Relations and Sales Activities, and EXHIBIT NO. XXIX, consisting of copy of "Consent" to be signed by a merchant agent, 2-page explanation, and 21-page questionnaire, were received in evidence.)

Q. Did you obtain such a questionnaire as Exhibit XXIX filled out by L. P. Simpson, of Carrollton, Illinois?

A. Yes, I did.

Q. I direct your attention to question No. 23 on that questionnaire, reading, "State the name of each of your associates, assistants and employees and the occupation of each. (Your wife and any relative who renders any assistance to you in your business should be included as assistants.)", and ask you if that question was answered by Mr. Simpson.

A. Yes, it was.

Q. And what was the answer?

A. The answer was, "Virginia Imus, bookkeeper, handles express office; William Imus, embalmer and general helper; William Parker, general mechanic; Charles Standifer, clerk; George Merriman, general helper; Arthur Ruyle, driver; part time each day; Mrs. L. P. Simpson, helps at funeral home."

1747 Q. And I direct your attention to question 24 of that questionnaire, Exhibit XXIX, which reads, "State the names of each associate, assistant or employe who at any time handles at your express agency Railway Express Agency shipments," and ask you if that question was answered by Mr. Simpson.

A. Yes, it was.

Q. And will you state that answer?

A. "Virginia Imus, in general charge; L. P. Simpson, often; William Imus, occasionally; Arthur Ruyle, all deliveries and pickup; all of the rest, if and when needed."

Mr. Long: Your witness.

Examiner Funk: Mr. Crawford?

Cross-Examination by Mr. Morgan.

Q. Mr. Lace, I understood you to make a distinction respect to the duties and requirements of a merchant gent as distinguished from some other agent. Do you ake a distinction on that?

A. Yes, sir.

Q. And will you tell me what the difference is now gain?

A. One distinction is that we require salaried agents d exclusive commission agents to do certain public relaons and sales work and render their reports on work hich is done.

Q. Mr. Lace, are you familiar with some of the testiony that has gone on in these different hearings? For stance, there was one held in December 1937, and again August 1938, and in August of last year. Are you famil- r with the testimony in those previous hearings?

A. I am familiar with the testimony in the August 1948 aring.

* * * * *

50 Q. Well, do you know the difference between the duties of a merchant agent and a joint agent, and if , what would be the distinction? As to the handling of press only. As to the handling of express in all of its ases, assuming all of the responsibility, performing all the duties in connection with the conduct of Railway press Agency business. What would be the difference tween the duties and responsibilities of a merchant agent distinguished from a joint agent's duties insofar as ndling express is concerned?

Mr. Long: Now do you go to the specifications of the rk, Mr. Morgan?

Mr. Morgan: Mr. Examiner, my question speaks for it- f.

Examiner Funk: I believe he is entitled to an answer, Mr. Long.

A. At a joint agency, through our connection with the railroad, we would have control over the man that we would not have at a merchant agency.

* * * * *

1751 Q. Mr. Lace, I'll address that same question again. What is the difference in the work necessary to be performed by a railroad agent and the responsibilities attaching to that work performed for and in behalf of the Express Agency by a joint agent, as we understand the term joint agent, as distinguished from a merchant agent?—What is the difference between the performance of that work by the joint agent assuming the responsibilities and that selfsame work being performed and responsibilities assumed by a merchant agent, if any?—The handling of exclusive express traffic.

1752 A. I think I stated before, we are able to control the manner of rendition of service at the joint agency.

Q. And I stated before, Mr. Lace, that that was not responsive. Please tell us what the distinction is in the performance of that express work by the joint agent. Not having anything to do with the control of the express work. What is the difference in the performance of those duties of express work and the assuming of responsibilities by a joint agent as distinguished from a merchant agent?

A. Well, I am trying to answer in this way. At the joint agency we have control of them. If we say that the business for a certain customer shall be made available to him at nine o'clock in the morning, we can control that. At the merchant agency we could not.

Examiner Funk: Is there any difference in the work performed by the two?—The actual work.

Witness: No. If it is receipting for a shipment, they would receipt for it in the same manner. If it is the delivery of a shipment, they would collect money for it in the same manner.

Examiner Funk: What you are trying to say is merely that there is difference in the control.

Witness: That's right.

Q. A shipper by express comes in to the joint agent to send out a shipment by express, Cleveland, Ohio to San Diego, California, and he is in an office of a joint agent. The forms that are used and the work attached to the handling of that shipment—are the work and the forms any different when performed by the employees of the merchant agent than when performed by the joint agent?

A. The work and the forms would be similar.

Q. And the attaching of all responsibilities as to proper protection of that shipment, all that Railway Express Agency advertise as being offered to the public—there would be no distinction as to those phases either, would there, Mr. Lace?

1753 A. You are getting back to the control there.

Q. No, Mr. Lace. Please stay with the answer. Don't tell me what the question is. Answer my question if you can. Don't get into those unknown phases. Isn't the joint agent expected to carry out all of the requirements of the Express Agency as to expediting that service, giving it proper protection, hand-to-hand signature, etc.? The joint agent is expected to perform those services, is he not?

A. Yes.

* * * * *

Q. Now, a jewelry shipment is usually handled by hand-o-hand signature wherever the shipment is received by the Express Agency. Isn't that true, Mr. Lace?

A. Yes, sir.

Q. You understand what I mean by a hand-to-hand signature. If it is a certain value, you required that, don't you?

A. Yes, sir.

Q. That hand-to-hand signature is required for that shipment if handled by the joint agent, is it not?

A. Yes.

Q. Now, isn't that hand-to-hand signature required for the handling of that shipment if it originates at the office of a merchant agent?

A. Yes, sir.

Q. Let me take you down to Louisiana now, Mr. Lace,
in view of your previous testimony. In the straw-
1754 berry season, when you have strawberry movements
out of Louisana, you place an office in charge of a
merchant agent at one of these Louisiana towns—
with which you are perhaps more familiar than I, and I
shan't name the town—and you arrange with that merchant
agent to handle that business, if necessity requires it. Isn't
that correct?

A. I am not familiar with that operation.

Q. Well, are you familiar with the handling of perishable traffic in any phase?—And I'll stay with you, whatever town you want to name.

A. Yes. We handle—

Q. Baby chicks, for instance.

A. We handle considerable perishable traffic out of Godfrey, Illinois, in season—asparagus traffic.

Q. All right. We'll take it to Godfrey. Now, you arrange with that merchant agent to handle that asparagus—

A. No. That's a joint agency.

Q. Well, let us assume, then, that at Godfrey you have a merchant agent. That is all right for me to assume that it would be a merchant agent, for the benefit of the point. A new man takes over. You furnish him with all the forms necessary and incident to the conduct of the Express Agency business, don't you?

\. Necessary to that office, yes.

). Yes, sir. The superintendent would do it, or the te agent, in that set of circumstances, as the case may Now, let us assume that something came up that the rchant agent, being new, and reading these forms you nish, was in doubt about some phase of the handling of se shipments. What would happen in an instance of that d, so far as that new merchant is concerned?

\. No doubt he would consult his route agent.

). And undertake to get advice as to how that should handled. Is that correct?

\. The route agent no doubt then would clarify the forms for him.

Q. Yes. Well, now, suppose that I am a shipper of baby chicks out of that town, and I would observe t that merchant agent you had there at Godfrey, Illi-s was not handling the chicks in the proper manner, ording them the necessary protection, and I was losing ney as a result of that, and I took up with the super-endent that in my judgment this merchant agent they d down at Godfrey was not handling that traffic as it uld be handled. What would happen in a case of that d?

\. The situation would be looked into.

). By whom?

\. Probably the route agent.

). Some official of Railway Express Agency?

\. Some official or employee.

). Well, somebody charged with the responsibility of aring up the matter with that merchant agent. Isn't that rect?

\. That's right.

). And suppose he would decline to correct the irregu-ity. What would happen in that instance?

\. Our only choice would be to get another agent.

Q. Discontinue the arrangement, I believe you said in a previous statement.

A. That's right.

Q. Well, what is the difference between discontinuing the arrangement and an outright dismissal of an employee, if there is any, in your language?

A. Well, we don't consider him an employee, therefore we can't dismiss him, but we can determine the arrangement.

Q. If you didn't want to discontinue the arrangement with this merchant agent you had down at Godfrey, if the fellow had difficulty in understanding what the route agent meant even though he conferred with him, might the route agent not stay around for a few days and supervise
1756 the agent as to how to handle those baby chicks, etc.?

A. That is very doubtful. I can't say what you might do in a circumstance like that. You might prevail on the shipper to take it to the salaried office close by, an exclusive commission office, where we could assure him it would be handled.

Q. Then you wouldn't be discontinuing the agent. You would just be discontinuing the work. There would be no possibility for him to remain in your service, would there, Mr. Lace?

A. There might be other work.

Q. Well, there isn't any other work. The work that I'm talking about is work that the merchant agent is not performing in accordance with the requirements of the Express Agency and he needs to be shown how to handle that traffic. Now, would you send an official there long enough to teach him how to handle that traffic?

A. I can't answer that. I don't know. It depends on the volume of traffic, the value of it to us.

Q. Not depending on any of that, Mr. Lace. Now, you know your way around. Not depending on any of those

ngs. You want that traffic, you need the traffic, you have
that man who is a little dense and somehow or other
ply cannot understand these forms that you have sent
n there for him. They are all there, and they are about
se dimensions, incidentally, and he can't understand
n from a review of them, despite all your phone mes-
es or personal interviews with the route agent. He can't
erstand that. Is it possible that you might send a
te agent or the superintendent would go down and spend
ay or two with him?

. Well, the superintendent and route agent are both
busy people, and I can't conceive of them going into
office and spending two or three days with a merchant
nt.

* * * * *

Q. Do you mean to testify, Mr. Lace, that a shipper
of express traffic may not have every reason to ex-
that he would receive and be accorded the same cour-
, the same treatment, that is accorded all shippers of
ress, wherever the office may be located?

Unfortunately, we are not able to offer the same
of service at all offices.

The same type of service. Now what do you mean?
Personal service.

I am not talking about personal service. I am talk-
about the work incident to the handling of those baby
ks—the same supervision, the same forms necessary
filled out.

r. Long: That goes to the specifications, Mr. Morgan.

I am talking about the work incident to the handling
ose baby chicks. Might I not expect the same con-
ration from Godfrey, Illinois, that merchant agent, as
were attempting to ship those baby chicks from a
ried office at some other town?

A. Yes, you might expect it, but we will have to admit that our customers don't get the same kind of service.

Q. I am not talking about the temperament of different people in your service. I am talking about the work—handling those baby chicks. I have a right, as a citizen, to expect the Express Agency to receive those baby chicks at that merchant agent's office, do I not?

A. You do, and we as a carrier put forth every effort to render that type of service.

Q. I was a shipper down at Godfrey, Illinois, before. Now I am the president of one of the largest concerns that I might have in mind and you might have in this country. I just sprang up overnight. My work and my institution is of tremendous importance to Railway Express
1758 Agency. You, as superintendent, or a route agent,
come to me, being aware of the proportions of my business. You'd like to get some business from my firm. Now, do you tell me, when you come over and solicit me, either yourself as superintendent or as route agent or as commercial agent, that there is any distinction between the opportunity that I might have to get some business in an office that is in charge of a merchant agent in a Rocky Mountain town, as distinguished from a salaried office in a Rocky Mountain town?

A. Yes, there is a difference.

Q. Well, you are over now trying to get my business. You are a commercial agent, you are a route agent, you are a superintendent, and you point out to me that here is an official directory of Railway Express Agency that lists every office in the Rocky Mountain region, every town of any dimensions. Do you tell me that now I can't ship very well to this particular town because it is in charge of a merchant agent, whereas I can ship to these other towns because they are salaried offices or exclusive commission offices? Do you tell me that?

Not necessarily. I might tell you you can ship to own and we will provide delivery service on your ent; at this next one, we are sorry but we don't pro-hat service.

Yes. Well, now, Mr. Lace, let me ask you this. Do tand back of this directory? I'll show you that. Do tand back of it as an official of Railway Express y?

Yes, sir.

Well, does that document in and of itself that you to me when you are over soliciting my business make istinction between that merchant agent in the Rocky tain region, the exclusive commission agent, or the ed office? Does this document in and of itself that ave with me make any distinction?

No, it does not.

Q. I can assume then that I would rather rely on his document than what you now state you might ell me there, that there would be some distinction. hat correct?

The distinction I mentioned is shown in there.

miner Funk: Is this directory to be introduced as ce, Mr. Morgan?

Long: We have no objection to it, if he wants to. wants to put it in evidence, we will furnish a copy -What issue is that, Mr. Morgan?

Morgan: That's '39.

Long: I don't know whether we have an old one, current one won't make any difference, will it?

Morgan: No.

Long: You'll get one.

Morgan: I don't have any further questions.

miner Funk: Mr. Hassenauer?

Hassenauer: No, sir.

miner Funk: Mr. Long?

Long: No, no further questions.

By Examiner Funk:

Q. Mr. Lace, you heard Mr. Long this morning describe the various categories into which agents of Railway Express Agency are divided.

A. Yes, sir.

Q. You will note that category No. 2, which is divided into groups (a) and (b), refers to exclusive agents. Do you recall that?

A. Yes.

Q. Taking this category (a), to begin with, can you tell me whether there is any difference in the work performed by merchant agents and the work performed by those individuals referred to in category 2(a)?

A. Yes. In connection with public relations and sales work, in connection with the manner in which the office is to be kept, as to appearance, there is a difference.

1760 Q. As to the work. You state there is as to public relations and sales. What is that difference, Mr. Lace?

A. We require the type of agent shown here, the exclusive agent, to make certain public relations and sales contacts that we do not require the merchant agent to make.

Q. What is the nature of those public relations and sales contacts?

A. Principally solicitation of express traffic and services.

Q. Do you expect any of your merchant agents to solicit traffic for the Railway Express Agency?

A. We don't require them to.

Q. Do you ask them to?

A. No, sir.

Q. Mr. Lace, I am a little interested as to the background and origin of this $125 per month figure. Will you tell me something about it?

A. No, I'm sorry, I can't give you the history of it.

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Long: May I state that Mr. Hall, who is on the
ommittee, will give you all the information you want
, Mr. Examiner. I expect him to go on the stand
ow morning, the first thing.

Vith regard to category No. 2(b), Mr. Lace, can
me how these individuals can be distinguished as
performed from merchant agents?

The same distinction as category (a).

Vith regard to joint agents, Mr. Lace, what is the
ion? Do they also perform public relations work
es work?

No, we don't require them to do it.

Vell, then, Mr. Lace, what is the distinction, insofar
work performed is concerned, between merchant
and joint agents?

t a merchant agency, the work is usually per-
at the time the merchant agent wants to perform
eas at a joint agency it is performed at the time
at is best suited to the customer.

Q. Would you say it is the same type of work?
e only distinction you make, as I understand it,
the one may choose his time to perform the work
other man is required to perform it at a specified
s that correct?

es, and we can have better control of the courtesy
ublic and promptness in waiting on them and things
nature.

ou expect, however, that the merchant agent will
the common carrier obligations of Express Agency
ply with them?

es, sir.

ow, with respect to the caretaker, custodian agents,
tell me how their work is distinguished from mer-
gencies?

here again, usually the caretaker is employed by
oad, and through them we have more control.

Q. I understand your statement on that, but I mean, there any difference as to the work performed? Do they oth perform the same type of work?

A. Yes, they do.

Q. Do you ask the caretaker or custodian agent to per- orm any public relations work or sales work?

A. No.

Q. I refer you to category No. 9 discussed by Mr. Long his morning. I want to ask you how the work performed y individuals in that category is distinguished from the ork performed by merchant agents.

A. Well, we control the premises.

Q. Is that the only distinction?

A. Yes—and as a result of controlling that, we can tell hem when we want the service performed, and how.

Q. That is your only distinction.

A. And also the condition of the facilities as to neat ppearance to the public, etc.

Q. Referring back to page 9 of the hearing last 762 August, Mr. Long, in referring to merchant agents, stated as one of their characteristics: "He has the ight to exclude any representative from his premises," tc. Are you able to say, Mr. Lace, from your own ex- erience, whether the Express Agency would continue a erchant agent at a particular location if that merchant gent refused to permit representatives of the Express gency, such as the route agent, the auditor, someone in imilar capacity, to come on the premises and examine his ooks?

A. We wouldn't continue him if we could find another erchant agent.

Q. Well, what if you couldn't find another merchant gent in that locality? What would you do?

A. We'd have to establish a different type of office, or the business was small, we might ask for authority to ose the office.

Q. In
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By Mr. M

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her words, Mr. Lace, in your opinion—now, this
jected to by Mr. Long—but in your opinion, if
he route agent coming out there, would you feel
d the right to go on his premises to examine his

g: I would like to object to that, Mr. Examiner,
add to the question "at a reasonable business
en I would have no objection.
r Funk: I'll be glad to do that.
I should think so, if it was at a reasonable busi-

gan: I want to ask one more question, Mr. Long.
g: Go ahead, Mr. Morgan.

rgan:

e merchant agent subject to being governed by
ent of trains handling express incoming and
his office? Is he obliged to conform to the
f those trains, or are the trains subject to his
espect of that condition, Mr. Lace?
rt of his duties consist of removing the traffic
ain or putting the traffic on the train, he'd have
ned by the schedule.

* * * *

No. 7 goes through the merchant agent's town
n-fifteen a.m. Is the merchant agent expected
train and dispatch on the train such business
have going out of the town at that time?
't know, because I don't know what town you
g of.
talking about the merchant agent's town.
there are a lot of them.
any one—all of them or any one. No. 7 goes
seven-fifteen a.m. Is the merchant agent ex-
eet that train, take off such business as there

might be for his town, and dispatch on No. 7 such business as he might have outgoing?

A. I still can't answer your question.

Q. Well, then, No. 8, bringing business in in the afternoon, is due in at three-fifty-nine p.m. Is the merchant agent privileged to meet that train at three-fifty-nine or wait until five-thirty p.m. and handle the business then? Now, that is a clear question, isn't it? If not, I'll make it clearer for you.

A. I wish you would.

Q. Well, then, No. 8 is scheduled to arrive at three-fifty-nine p.m.—

Mr. Long: Mr. Morgan, we would save a lot of time if you will permit the witness to explain why he doesn't answer the question.

Q. No. 8 is due in and carries express. Now, can the merchant agent use his discretion as to whether or not he meets No. 8?

1764 A. He may not be the man that meets the train. Perhaps the drayman at the town meets the train.

Q. Well, he is the only man there, Mr. Lace.

A. You didn't make that clear.

Q. I'll say that now. I am talking about No. 8 at the merchant agent's town, and he is the only man there at that town. Now, there is no escaping that on the part of the witness, is there?

A. No.

Q. No. 8 comes in at three-fifty-nine, and he is the only man there. Is he free to use his discretion as to whether he meets that train at three-fifty-nine or otherwise?

A. No, he is not.

Q. What do you mean by "he is not"?

A. He is not free to use his discretion.

Q. That is, he must meet No. 8 at that time if he expects to hold that office. Is that correct?

A. That's right.

Mr. Morgan: Thank you. That's all.

By Mr. Crawford:

Q. Mr. Lace, the Examiner in questioning you asked you a question substantially this: that if a merchant agent wouldn't do a certain thing—I forget just the details—what would you do, and I think your answer was that if you could find another agent you would discontinue the arrangement. Then the Examiner asked you, "Well, suppose you couldn't get another agent," and I think you said you would then make arrangements to get another type of office or set up another type of office. Now, what other type of office would you set up other than the merchant agency?

A. We might set up a joint railroad office.

Q. Any other type you would consider?

A. That, of course, would depend on the amount of business in the town.

1765 Mr. Crawford: That's all.

Examiner Funk: Any further questions, Mr. Long?

Mr. Long: Just one question.

By Mr. Long:

Q. Mr. Lace, as superintendent, would you have the right to enter any agency controlled by an employee agent at any hour of the day?

A. Yes, I would.

Q. Does that also apply to merchant agents?

A. No, it does not.

Mr. Long: That's all.

Examiner Funk: Mr. Lace, referring you again to that category No. 9, would you have the right to enter the offices of the individuals referred to therein at any hour of the day or night?

Witness: Yes. We are paying for the premises.

* * * * *

MR. L. G. McADAM was recalled for examination and testified as follows:

Direct Examination by Mr. Long.

Q. Mr. McAdam, you testified in the hearing in this proceeding in August 1948, did you not?

A. I did.

Q. Have you read the testimony that you gave at that time?

A. Yes, I have.

Q. Have you found any errors in it?

A. Yes. They have got my name spelled wrong.

Q. What is your correct full name? Will you spell it, please?

A. Lincoln, L-i-n-c-o-l-n, Grant McAdam, M-c-A-d-a-m.

1766 Q. Are there any other corrections that you would like to make?

A. I would like to make a correction as to the number of offices in my district. I stated, I believe, there were 132 offices in my district. The amount should have been 122, of which 102, instead of 112, are joint commission offices.

Q. That is, joint with the railroad?

A. Correct.

Q. And the balance of your statement there is correct, is it?

A. That is correct.

Mr. Crawford: What page is that?

Mr. Long: That is page 292, at the very bottom.

Q. Have any changes taken place in your territory since your testimony in August 1948?

A. Yes. Two joint commission offices were closed, with authority from the Interstate Commerce Commission. That's St. Augustine, Illinois, and Garden Plain, Illinois.

Q. And have any changes been made with respect to merchant agents?

A. Yes. In October of 1948, our merchant commission agent at La Harpe, Illinois informed me that his other business had grown to such an extent that he could no longer handle our business. Therefore, I appointed another merchant commission agent at La Harpe, whose name is Albert Barrett.

Q. And what kind of business was the previous agent engaged in?

A. The previous agent conducted an ice cream and candy store, and sundries, and the present agent runs a shoe repair shop.

Q. Well, now, how much notice did the ice cream parlor man give you so that you could make another arrangement?

A. He gave me 30 days and was willing to continue longer if I wasn't able to find a successor to him, but I had no trouble.

Q. Now, in your territory, I believe you told me, there
was an exclusive commission agent whose net earn-
1767 ings were under $125 per month. Is that true?

A. Yes, that is true.

Q. And who is that agent?

A. His name is Wayne Elliott, at Farmington, Illinois.

Q. And are you acquainted with the circumstances under which that agency became an exclusive commission agency?

A. Yes, I am.

Q. Will you detail those, please?

A. About 1931, due to decrease in traffic at Farmington, a change was made. At that time, there was a salaried agent and a regular employee, driver employee. The management at that time wished to discontinue the salaried agency and make it an exclusive commission office.

The salaried agent was not willing to accept it on that basis and exercised his seniority rights at Monmouth, Illinois, where he held seniority, and the office was taken by the driver.

Q. That is, the driver was a regular employee of Railway Express Agency?

A. He was a regular employee at that time.

Q. And is he still our exclusive commission agent there?

A. Yes.

• • • • •

Mr. Long: Oh, just one more question. Mr. McAdam, I believe that Mr. Horton at Nauvoo is a merchant agent in your territory. Is that right?

1768 Witness: That's right.

Mr. Long: I'd like to have this marked as Exhibit XXX. I'd like to offer this in evidence.

Examiner Funk: That will be accepted.

(Advertisement sheet listing various articles and services available, entitled "Why Didn't Somebody Tell Me These Things," dated December 1944, and stamped "Horton's Standard Service," received in evidence and marked Exhibit No. XXX.)

• • • • •

MR. STEPHEN P. VICTOR, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows.

Direct Examination by Mr. Long.

Q. I think you made an outline of the facts concerning which you were going to testify, Mr. Victor?

A. That's right.

Q. I think you may use that in testifying. —Will you state your full name, address, and occupation?

A. My name is Stephen, S-t-e-p-h-e-n, P. Victor, V-i-c-t-o-r. I reside in the Village of Glen Ellyn, Illinois. My position is that of Auditor of Disbursements of Railway Express Agency, Inc., and my headquarters office is located at 817 South Wells Street, Chicago.

Q. Will you please detail the history of your employment with Railway Express Agency, Inc.?

A. I have occupied the position of Auditor of Disbursements for five years.

Q. Is that in Chicago?

A. In Chicago. I have been in Express service twenty-
six years, all of which were spent in the Regional Ac-
769 counting Department at Chicago, fifteen years as
Chief Clerk to the Auditor of Disbursements, six
ears as Chief Clerk in charge of the Express Receipts De-
artment, and five years in my present position.

Q. What territory do you cover, and what are your luties as Auditor of Disbursements?

A. In my capacity as Auditor of Disbursements, I have upervision of the accounting of disbursements for the erritory generally west of Pittsburgh, Pennsylvania, north f the Ohio and Missouri Rivers, west of the states of ansas, Oklahoma and Texas, to the Pacific Coast, includ- ng also offices of the Dominion of Canada and the terri- ories of Hawaii and Alaska. Such accounting for dis- ursements in general pertains to the auditing and account- ng for payroll and other expenditures chargeable to op- rating expenses, taxes and other accounts, the mainten- nce of records and accounts of the value of real property nd equipment and depreciation thereon, the maintenance f employees' earnings records and federal income tax ithheld, and the reporting thereof to governmental gencies.

Q. Does that also include the maintenance of employees' ecords with respect to the Railroad Retirement Tax?

A. That is right.

Q. And the contributions with respect to the Railroad Unemployment Insurance Tax?

A. It does.

Q. What else is included with respect to the accounting having to do with payrolls over which you have charge?

A. The audit and distribution to operating expenses and other accounts of the cost represented by payrolls, the preparation of vital payroll statistics required by the Interstate Commerce Commission, and the maintenance of individual records of employees' earnings and the amount of federal income tax withheld.

Q. Who are carried on the payroll?

1770 A. Bona fide full-time employees only.

Q. Are merchant agents included on such payrolls?

A. No, they are not.

Q. Mr. Victor, I direct your attention to exhibits marked 31-A, 31-A(1), 31-B, 31-B(1), and 31-C and 31-C(1), and ask you what, if anything, you had to do with the compilation of those exhibits.

A. Mr. Gross has delegated to me the job of checking the exhibits detailing the merchant agents and the refunds sought insofar as the Chicago region is concerned. The check of these exhibits is made from information obtained from the field through a questionnaire, which questionnaire, in our opinion, furnished sufficient information so that we could sort out those agents who fell completely within the definition of merchant agents as defined on pages 9 through 12 of the transcript of the testimony of the hearing held August 10, 1948, and as narrowed or confined by Mr. Long's statement made here today.

Q. Now, do you have that questionnaire with you, Mr. Victor?

(A "questionnaire" consisting of four pages and con-ning nineteen questions was marked Exhibit No. XXII.)

Q. Now, can you state the manner in which the quesonnaires were sent to the field and the manner in which check of exhibits 31-A, B, C, and 31-A(1), B(1) and 1) was made?

A. The questionnaires that were sent out to the field re completed and sent to Chicago by the entire system, d I took part in checking the exhibits against the inrmation shown therein, and from that information were mpiled the exhibits which have just been presented and entified as Exhibits 31-A, 31-A(1), 31-B, 31-B(1), and -C and 31-C(1).

Q. I direct your attention to Exhibits 31-A, 31-B and -C, and ask you if any corrections were made therein.

A. It will be noted that certain agencies and agents have been eliminated from these new exhibits. That 71 was brought about by a further check of all the agents and agencies therein. On this further check, found that the following individuals were not properly ssified as merchant agents for the reasons given, and refore they were eliminated from the exhibits.

Q. Now, what were these reasons?

A. For Putnam, New York, A. M. Ritchie. The exess office on railroad premises was not controlled by agent.

Q. Now, I think you mean not controlled by the Agency by the Express Agency.

A. No. By the agent. That's why it was eliminated.

Q. That's right. Excuse me.

A. B: Mount Union, Pennsylvania, T. H. Whitsel. The press office was on railroad premises and not controlled the agent. C: Mount Sterling, Illinois, L. S. Mehl d Wilma Mehl. The express office and premises rented Railway Express Agency, and therefore not controlled

by the agent. D: Rockville, Indiana, C. C. Harrison. The express office was in premises rented by Railway Express Agency, Inc. E: Gaylord, Michigan, L. H. Henderson and E. I. Lynch. Express office in premises rented by Railway Express Agency, Inc. F: Bremerton, Washington, W. F. Sachtelben, exclusive commission agent. G: Columbus, Wisconsin, A. H. Mueller, an exclusive commission agent. H: Port Washington, Wisconsin, W. D. Poole, an exclusive commission agent. He was given employee privileges, such as paid vacations. I: Commerce, Georgia, H. O. Williams. Express office in premises rented by Railway Express Agency, Inc. J: Shamrock, Oklahoma, G. R. Arnold, joint agent. Joint agent at least up to April 13, 1942. He evidently took care of our business as a favor to the end of the month. The elimination of these agents and agencies made necessary the corrections in computations appearing in Exhibit 31-A on pages A-10, A-13, B-15, B-18, B-44, B-46, B-47, and C-10; in Exhibit 31-B on pages A-11, A-14, B-18, B-22, B-26, B-46, and C-4;
and in Exhibit 31-C on pages A-15, A-19, B-26, B-31,
1772 B-38, B-65, B-66, B-70, B-72, C-5, and C-14. Corresponding corrections were also made in each Regional Accounting Department recapitulation of compensation, taxes withheld and contributions paid, and in the final recapitulation on each exhibit.

Q. May I direct your attention to the fact that after the names of some of the merchant agents in these exhibits, set forth in parentheses is "Sub Agent," and ask you what the significance of those words is.

A. This refers to substitute merchant agents. These have been appointed generally by the merchant agent, as, for example, R. H. Landewe, who acted as substitute for regular merchant agent A. J. Elfrink, at Laflin, Missouri, and who regularly was employed by Mr. Elfrink as a clerk. Another example is that of Albany, Missouri, where Theron

at and Ray H. Thompson were partners in a dry clean-
stablishment and one substituted for the other during
regular agent's absence. However, in a few cases,
e the merchant agent died or became so ill as to be
le to carry on the business, it was necessary that a
agent arrange for the continuance of our business
e particular locality, and he in some instances con-
ed with such substitute agent. As an example of this
tion, there is Flintstone, Georgia, where former mer-
t agent T. A. Yates died November 11, 1943, and our
agent on November 12, 1943 arranged to have our
ess handled by Mr. Yates' clerk, Kathryn L. Bonds,
took care of the agency until December 31, 1943, from
h date a new merchant agent, Rita Williamson, took

Now, in making this investigation, did you find any
hant agents who became such by reason of the fact
they bought out or inherited a business formerly car-
on by a merchant agent?

I did.

And will you set forth examples of such cases?

At Henderson, Minnesota, George Burla, merchant
agent, advised he "bought into livery and dray busi-
ness, and inherited Express Agency." Clintwater,
Michigan, A. J. Greiner, merchant agent, advises:
as here at the time of purchase. Also inducement for
c to come in store." Gold Beach, Oregon, G. H. For-
merchant agent, advises: "It was at the establish-
when I took over." Bristol, Wisconsin, E. F. Nel-
merchant agent, advises: "Took agency over from
er person whose store I bought."

Did you also supervise the compilation of Exhibits
(1), 31-B(1) and 31-C(1)?

I did.

And what do those exhibits set forth?

A. They set forth additional merchant agents who we later found were inadvertently omitted from Exhibits 31-A, 31-B and 31-C.

(The hearing recessed at 4:45 P. M., March 14, 1949.)

1782 (EXHIBIT NO. XXXIV, as described by Mr. Long, was received in evidence.)

Mr. Long: May Exhibits XXXI-A, XXXI-B, XXXI-C, XXXI-A(1), XXXI-B(1) and XXXI-C(1) be accepted in evidence?

Examiner Funk: They may be so accepted.

(Exhibits received in evidence, marked as follows:

Paper-bound book entitled "Railroad Retirement Taxes and Income Re Merchant Agents Individually for the Period January 1, 1937 to December 31, 1942, Inclusive"—EXHIBIT NO. XXXI-A.

Sheet entitled "Data, Abstracted From the Accounting Records of Railway Express Agency, Incorporated, Relating to Income of Merchant Agents and Their Assistants Computed, or Estimated, and Reported by Merchant Agents for Tax Purposes as Derived Exclusively in Connection With the Handling of Business of Railway Express Agency, Incorporated, at the Express Agencies Operated by the Merchant Agents"—EXHIBIT NO. XXXI-A(1).

Paper-bound book entitled "Railroad Retirement Taxes and Income Re Merchant Agents Individually for the Period January 1, 1943 to December 31, 1947, Inclusive"—EXHIBIT NO. XXXI-B.

Sheet headed the same as Exhibit No. XXXI-A(1)—EXHIBIT NO. XXXI-B(1).

Paper-bound book entitled "Railroad Unemployment Insurance Contributions and Income Re Merchant Agents Individually for the Period July 1, 1939 to December 31, 1947, Inclusive"—EXHIBIT NO. XXXI-C.

Sheet headed the same as Exhibit No. XXXI-A(1)—EXHIBIT NO. XXXI-C(1).)

Long: And may Exhibit XXXII be accepted in evi-
?

aminer Funk: It may be so accepted.

XHIBIT NO. XXXII was received in evidence.)

Mr. Victor, directing your attention to Exhibit
IV, and particularly to the signature of W. A. Benson
on, will you please state who Mr. W. A. Benson is?

He is the Vice-President in Charge of Accounting,
ay Express Agency, Inc., whose headquarters office
230 Park Avenue, New York City, New York.

Now, did you participate in the drafting of Exhibit
IV?

I did.

* * * *

Q. Referring to Exhibit XXXIII, Mr. Victor, are
branch agencies listed in this directory?

No.

Are merchant agencies listed in this directory?

Yes.

Why is that, if you can tell me?

I can't answer that.

Long: We can have an operating man answer that
ion.

Mr. Victor, at the first hearing there was introduced
idence Exhibit No. 15, which showed the number of
railroad-express agencies receiving varying amounts
nmissions for the month of March 1937. Included in
xhibit were a number of agencies which although the
iduals representing the express company represented
he railroad companies, their activities were not con-
to services performed for railroads and express com-
s. At the rehearing, Exhibit No. 1-A was introduced.
was a statement showing the number of merchant
s who served the railroads and Express Agency, re-
ig varying amounts of commission for the month of

March 1937. I believe there were 387 agencies where the express agent also performed some railroad work. You testified that you assisted in the preparation of Exhibits XXXI-A, B and C, and XXXI-A(1), B(1) and C(1). Can you tell me whether or not there are included in these exhibits any individuals who in addition to their express
1786 work performed some service for railroad companies?

A. They are not included.

Q. There are none so included?

A. That's right.

Q. Well, Mr. Victor, you were present yesterday when Mr. Long mentioned certain categories. Take category No. 2. Can you give me some examples of individuals falling within category 2(a) and 2(b)?

Mr. Long: Our operating people can, Mr. Examiner. I don't know whether Mr. Victor has knowledge of that. He may. If he has, of course, he can testify. But we will have somebody who can testify to that and give you some examples.

Q. Mr. Victor, do you have any knowledge of the basis for this figure of $125 a month?

A. No, I do not.

Q. Can you tell me, Mr. Victor, approximately how many individuals listed in Exhibit No. V of the August hearing as merchant agents have now been eliminated and do not appear in Exhibit XXXI?

A. I cannot tell you that. There have been some eliminated—quite a number.

Mr. Long: And I might say that they will be shown by a comparison of the new exhibits with the old. We haven't made a check of the number, but they are in the record. They can be shown by comparison of the new exhibits with the old.

Examiner Funk: Mr. Long, will one of your future witnesses be prepared to discuss these categories at greater length and give examples?

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ong: We have some examples in the record al-

iner Funk: Yes, but I would like to have examples arious groups, in order to assist in distinguishing the categories.

Mr. Long: Mr. Lace can give some examples of st of these, and I think that Mr. Hall can give amples of others, and I might say that Mr. McAdam ady specified one example of category 2(b), and ticular agent is the only example of that category 1 I have knowledge and of which any of my wit- ere have knowledge. There are a number under 2(a), and Mr. Lace, I believe, can give you those.

* * * *

Mr. Crawford: I have one question I will direct ier to Mr. Victor or Mr. Long, as a matter of tion. As I understand it from the testimony, the here offered, XXXI-A and on down, are not com- far as the check is concerned. Is that correct?

ong: Oh, yes, they are complete. Every single there has been checked against the questionnaire, netimes double-checked. I might ask Mr. Victor at for the record.

Long:

r. Victor, in checking Exhibits XXXI-A, XXXI-B, ', did you at any time find it necessary to write the field for clarification of any particular agency idual?

e did so very frequently.

nd at times you had to write more than once to e superintendent with respect to the same agent, not?

hat's right.

Q. So that every one of the individuals and
792 agencies set forth in Exhibits XXXI-A, B and C and XXXI-A(1), B(1) and C(1) have been checked gainst questionnaires, have they not?

A. They have, to insure that they completely and en-irely come within category No. 6.

Q. And have they also been checked against your ac-ounting records with respect to reports made to the Re-irement Board?

A. Definitely.

Mr. Long: Does that clarify it?

Mr. Crawford: Yes. I wanted to determine whether r not there was a possibility of eliminating any more or hether he had made a complete check.

Mr. Long: They have been double-checked.

Examiner Funk: Mr. Victor, do you know of your own nowledge whether or not any of the individuals listed in xhibits XXXI-A, B and C, and XXXI-A(1), B(1) and (1) have been awarded annuities under the Railroad Re-rement Acts based upon such service?

Witness: No, I don't know that. I know of some that etired, and I gather from information that has come to ur office that they have filed a claim for annuity.

Examiner Funk: Does your claim for refund include ame of these people who have retired, Mr. Long?

Mr. Long: That, I cannot answer. I would not have ny knowledge of any who had retired or claimed retire-ent except with respect to one, and I'd like to, for the urpose of the record, ask the Examiner if he will make a art of the record the records of the Railroad Retirement oard with respect to A. W. McLeary, having Social Secu-ty No. 720-16-6953, who operated as a merchant agency t Kingfield, Maine, between and including at least January 1937 and February 10, 1947.

Examiner Funk: Well, Mr. Long, the annuity file of the

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oad Retirement Board could not be taken in as
xhibit, for several reasons. In the first place,
might be involved the question of disclosure of
n. In the second place, an exhibit must be re-
h the Examiner's records, and the "A" file
tained in the files set up for them, because they
ed at various times. If you have some informa
respect to that case that you wish to admit in
e will be glad to receive it.

g: Then I'd like to show Mr. Victor the ques-
nd consent form executed by Arthur Walter
f Kingfield, Maine.

Victor, will you read into the record the state-
by Mr. McLeary on that questionnaire?

to April 22, 1937, had been in express service
nce March 1, 1892, and before that as assistant
bruary 1, 1888. Resigned from express service
red to by Railroad Retirement Board officials)
er 22, 1937, and applied for retirement pension.
he way I have been denied on the assumption
not an employee."

r Funk: Do you know whether or not, Mr.
Express Agency, in submitting forms for Mr.
designated him as a merchant agent? I ask that
ecause I have seen some cases where the terms
nt and merchant agent have been intermingled
applied.

ow you this questionnaire filled out by Mr.
nd direct your attention to question 14, reading,
iness do you consider your principal business."
what Mr. McLeary's reply thereto was.

reply to question 14 is, "General merchandise."

r Funk: May I ask that the question itself be
these answers are read in so that we will
they are replying to.

Mr. Long: Question 14 reads, "What business do you consider your principal business."

1794 Examiner Funk: What about the other one?

Mr. Long. "You will note the questions refer to the present time. The Carriers Taxing Act became effective January 1, 1937. Therefore, will you please advise the date when you began to represent Railway Express Agency as Merchant Agent and will you also please explain any material changes which have occurred in the manner of conducting your agency since January 1, 1937."

Q. I also direct your attention to question No. 11 in Mr. McLeary's questionnaire, reading, "Please describe the nature of your business or businesses during the past ten years," and ask you what Mr. McLeary's reply thereto was.

A. Mr. McLeary's reply to question No. 11 reads, "General store—express agent March 1, 1892 to September 22, 1937."

Examiner Funk: Mr. Long, will you designate for the record the number of the exhibit from which you have been reading?

Mr. Long: The questionnaire referred to in connection with Arthur Walter McLeary is that questionnaire having Exhibit No. XXIX.—That is all.

Examiner Funk: Mr. Crawford?

Mr. Crawford?

Mr. Crawford: No.

Examiner Funk: Mr. Hassenauer?

Mr. Hassenauer: No.

Examiner Funk: Mr. Victor will be excused at this time, subject to recall, and I would suggest about a 15-minute recess.

(Mr. Victor was dismissed, and the hearing was recessed at 11:10 A. M., reconvening at 11:25 A. M.)

Examiner Funk: Referring to the case of Walter Arthur McLeary, Social Security Account No. 720-16-6953, A-12352, let the record show that Mr. McLeary has never been denied an annuity because of the fact that his service with Railway Express, Inc. was on a commission basis.

1795 MR. W. S. HALL, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows.

Direct Examination by Mr. Long.

Q. What is your name and address, Mr. Hall?

A. W. S. Hall. My address is 547 West Jackson Boulevard, Chicago, Illinois.

Q. You are employed by Railway Express Agency?

A. Yes.

Q. What is your present position?

A. Assistant to the Vice-President in Charge of Operations, Chicago, Illinois.

Q. As Assistant to the Vice-President of Railway Express Agency, Inc., Chicago, Illinois, what are your duties?

A. I am in charge of personnel and labor relations for the Operating Vice-President of the Central Departments, headquarters in Chicago. The area embraces the company's service in the states of Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, North Dakota, Ohio, South Dakota, Wisconsin, northern part of Colorado, southern part of Nebraska, and northern part of Wyoming. I am a member of the company's Committee on Personnel and Labor Relations, which is headed by the Vice-President in New York, who, with four assistants, the Operating Vice-Presidents, Atlanta, Chicago, New York, San Francisco, and a secretary, constitute the committee. The work of the committee embraces the entire system of Railway Express Agency.

Q. When did you begin your services in the railway express business?

A. July 20, 1904.

Q. Will you detail the history of your service in the railway express business?

A. I filled various positions of clerk and foreman at Richmond, Virginia, cashier for Southern Express Company at Danville, Virginia, agent for Southern Express
1796 Company at High Point, North Carolina, Agent for Southern Express Company at Greenville, South Caroiina, Agent of Southern Express Company, and later American Railway Express Company, at Charlotte, North Carolina, General Agent for American Railway Express Company at Norfolf and Portsmouth, Virginia, Superintendent, May 1, 1921 until August 1, 1938, for the Southern Express Company, at Washington, D. C. My territory embraced that company's service in Maryland, North Carolina, Pennsylvania, Virginia, and District of Columbia. I was Division Supervisor for Railway Express Agency at Charlotte, North Carolina, from August 1 to December 31, 1938, Superintendent for Railway Express Agency at Cincinnati, Ohio, from January 1, 1939 to July 31, 1940. The territory embraces the city of Cincinnati and suburban area. I was Superintendent of Railway Express Agency, Wisconsin Division, Milwaukee, Wisconsin, August 1, 1940 to July 15, 1945. The territory embraces substantially the entire state of Wisconsin and up the Peninsula of Michigan. On June 15, 1945, I was appointed Assistant to Vice-President of Central Departments with headquarters at Chicago, which position I have filled continuously since that date. During the time I was Superintendent at Washington, D. C., I was detached from the position for about eight months, during which time I acted as Chairman of the Southeastern Express Company's Efficiency Committee, and under my

risdiction made a survey of principal operations of that mpany.

Q. As Assistant to the Vice-President, then as a mem- r of the company's Committee on Personnel and Labor lations, have you acquainted yourself with the various lationships between the Express Agency and the agents iich represent it throughout the system?

A. I have.

Q. While you were acting as Superintendent, I pre- me you had under your jurisdiction some merchant ents.

A. I did.

97 Q. Did you ever have occasion to visit those merchant agents?

A. I have.

Q. Do you know whether any of the merchant agents der your jurisdiction had any employees, assistants or latives who assisted them in the performance of express rk at their agency?

A. They very often had.

Q. Was that generally true with respect to all merchant ents?

A. Yes. The wife, daughter or son of a merchant agent, d other help he may have employed in his own business, uld assist him in handling the express business.

Q. Did you have anything to say as to who should per- rm the express work in such agencies?

A. I had no control.

Q. Did you have anything to say as to what time of day merchant agency should open?

A. No.

Q. Or hours?

A. No.

Q. Did you or any of your route agents have a key to y of the merchant agents' places of business?

A. No.

Q. Did you have access to the merchant agent's place of business without the consent of the agent?

A. No.

Q. Did you have anything whatever to do with the employment or discharge or discipline of any of the merchant agents' assistants, helpers or employees?

A. No.

Q. Did any merchant agent ever consult you with respect to the hiring or discharge of his assistants, helpers or employees?

A. No.

1798 Q. Did you have anything whatever to do with respect to the expense the merchant agents were put to in the operation of the agency?

A. No.

Q. As Superintendent, did you ever keep a record of the number of assistants, helpers or employees a merchant agent had?

A. None whatever. That was his responsibility to have the work performed.

Q. Are you acquainted with Express Agency Forms 7050 and 7051?

A. Yes.

Q. What are those forms?

A. 7050 is a form entitled "Receipts and Expenses of Commission Agents," and is used for the reporting of all commission agents of their gross commissions and expenses to the District Accountant for the purpose of Railroad Retirement Taxes and other Payroll taxes. Form 7051 is entitled "Wages Paid to Individuals by Commission Agents," and furnishes the Express Agency's District Accountant information as to the wages paid individuals for retirement taxes and for other tax purposes.

Q. Is it the practice of the merchant agents to send these forms to the superintendent or the route agent?

A. No.

Q. Does the superintendent or route agent have any supervision over the expenses of merchant agents?

A. They do not.

Q. Are you acquainted with the General Rules and Instructions of Railway Express Agency?

A. I am.

Q. I direct your attention to Rule 624 of the General Rules and Instructions, reading, "Any employe entrusted with keys to safes, money drawers, etc., should carry such keys on a ring, and must at all times keep them where they cannot be taken or used without his knowledge," and ask you whether that applies to merchant agents.

A. No.

1799 Q. I direct your attention to Rule 892, reading, "Depot trucks must be pulled, not pushed, and when it is necessary to back them for any purpose employes must, before doing so, assure themselves that no one is in the way," and ask you whether that applies to merchant agents.

A. I'd say it does not. Some of them never have a four-wheeled truck.

Examiner Funk: Suppose they did have a four-wheeled truck?

Witness: Well, it would be the agent's responsibility to see it was properly handled.

Examiner Funk: Even if he was a merchant agent?

Witness: Yes.

Q. In the event a merchant agent should do any act which you considered as negligently jeopardizing the safety of passengers or outside individuals, what action would you take with respect to that merchant agent?

A. I would direct his attention to the act of which he was guilty and request that he mend his ways.

Q. In the event he failed to mend his ways, what punishment, if any, could you mete out to him?

A. I cannot promote him, and I cannot discharge him. We couldn't punish him by a layoff. The only thing we could do would be to discontinue his services.

Q. In the event you discontinued his services, what would the Express Agency be required to do?

A. Well, we would endeavor to find someone to represent us in the same manner.

Q. Could you continue to operate the Express Agency in the same place occupied by the merchant agent whose contract you discontinued?

A. No, we couldn't. We wouldn't have any right to.

Q. I direct your attention to Rule 1123, reading, "In opening pass bags and other reusable wrappers, never turn the knife point or edge toward the bag," and ask you whether that applied to a merchant agent.

A. No. A merchant agent wouldn't handle bags of that kind.

1800 Q. While you were Superintendent, was it customary to have prospective merchant agents fill out Form 100, entitled "Application for Employment"?

A. No.

Q. Was it customary to have assistants, helpers or employees of merchant agents to fill out that form?

A. No.

Q. Do you know of any instance where an assistant, helper or employee of a merchant agent filled out Form 100?

A. No, I do not.

Q. Mr. Hall, you were present during the entire hearing in August, 1948, were you not?

A. Yes.

. And do you recall the testimony given here by Mr. rieber and Mr. Jordan and Mr. Horton?

; Well, I heard them testify, but I don't know as I d distinguish the difference in the testimony.

xaminer Funk: Were you here throughout that hear-

itness: I was.

Mr. Schrieber was the agent who was a merchant t who had his office at Tell City, I believe, Mr. Jordan at Fremont, Michigan, I think, and Mr. Horton was anvoo, Illinois. Do you recall their testimony?

Yes, I do.

And would you say that their mrechant agencies were acteristic generally of merchant agencies in the entire em of the Express Agency?

I would consider them so, Mr. Horton's in par- ar.

Does the testimony which you have given with re- t to the merchant agent apply generally to merchant ts as a class throughout the system of Railway Ex- Agency?

It does.

* * * * *

Q. What are the differences between a merchant agent and an exclusive commission agent?

Well, the exclusive commission agent devotes his time to express business, and may in some instances to employ help. A merchant agent has other busi- and conducts the business in his store or place of ess—filling station, garage, what-not—and those that ay employ to help him in his business may assist in ling express work. With the exclusive commission t, we usually provide the facilities or pay the rent. lways but in most cases, telephone, light, heat, whereas nerchant agent provides those facilities.

Examiner Funk: Do I understand you to say that you do not always supply the place in which an exclusive commission agent performs his work?

Witness: We supply it or pay the rent.

Q. Now, some mention has been made here of the sum of $125 per month in connection with exclusive commission agents. What have you, if anything, to say with respect to that, Mr. Hall?

A. Well, we have a provision in our agreement with the Brotherhood of Railway Clerks which provides that commission agents receiving a net monthly income of $125 or less are excluded from the agreement. If it is $125 or more, after deduction from gross commissions of such items as rent, telephone, light and vehicle service, as well as amounts paid to other employees by him, then he is subject to the agreement rules—the agreement coverage.

Examiner Funk: Does that apply to all commission agents?

Witness: Well, it does not apply to merchant agents—those having other business.

Examiner Funk: Is that the only reason—that they have another business?

1814 Witness: Well, they do not devote their entire time to the express business. That is one thing. And then they have other business. Under the provisions of the agreement, we have never considered commission agents to be subject to the agreement unless their net income is $125 or more.

Q. Do you recall the history of the establishment of this $125-per-month provision in the agreement with the clerks?

A. Well, it was first contained in our agreement of 1927.

Q. And came about how?

A. Negotiations.

. And at that time, did we consider exclusive com-
sion agents as employees?

. Well, yes, I would say we did.

. And was that the reason why the negotiations with
ect to that type of employee were carried out?

. Well, the demand by the organization that they be
red, and it resulted in that provision in the scope rules.

And have we always considered the merchant agent
n independent contractor?

We have. That rule carries a provision that indi-
als performing a particular service requiring only
of their time—we contend that that applies to the
hant agent.

r. Long: That's all.

aminer Funk: Mr. Crawford or Mr. Morgan?

Cross-Examination by Mr. Morgan.

These forms 7050 and 7051, filled out by the exclu-
commission agent—you say they are sent direct to
istrict Accounting Bureau?

Yes.

Q. They are likewise sent direct to the District
Accounting Bureau by the merchant agent?

A. Yes.

There is no difference between a merchant agent
commission agent in respect to where they send
forms, is there?

No.

So you didn't mean to convey that there was any
ction when you testified that they sent those forms
to the District Accounting Bureau?

They all send them direct to the District Account-
ureau, all commission agents who have those forms.

That applies both to the exclusive commission agent
the merchant agent?

A. That is correct.

Q. Now, you testified in respect to certain rules in the General Rules and Instructions of the company not applying to merchant agents, did you not?

A. That's right.

Q. Now, what is the intent of those General Rules and Instructions, Mr. Hall, if you may enlighten me on that a little bit?

Mr. Long: I object to that, upon the ground it speaks for itself.

Q. Well, do you have rules issued by the company applicable to train service employees, Mr. Hall?

A. All general rules and instructions are contained in one publication. However, Issue 36, those pertaining to train service employees and those pertaining to vehicle employees, were, for convenience of the employees of those two classes, drawn out and printed in a different small book.

Q. I was going to ask you if you didn't also have a book of rules and instructions to vehicle employees, but since you have included them in your answer to my inquiry about whether or not you had them for train service
1816 employees, let me ask you to explain what you mean
by the convenience to those employees. Am I to understand that the rules peculiarly applicable to them that are set forth in the General Rules and Instructions are set apart and referred to in a separate book of rules and instructions to train service employees? Is that correct?

A. Yes.

Q. Now, is it also correct that there is a separate book of rules bringing prominently to the fore the rules that are peculiarly applicable to vehicle employees?

A. That is correct—as to the 1936 issue of the General Rules and Instructions.

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Well, why do you mention that particularly, Mr.
-1936? What I mean by that is this. As far as I
those separate books of rules and instructions to
service employees and vehicle employees have been
for a great number of years. Why do you mention
ar 1936 particularly?

Because that is the one that we have been using
a short time ago?

Well, there is no significance attaching to that year,
e purpose of my questions and answers, is there?

Well, I'm not positive as to whether they were pub-
separately prior to that time or not. That goes back
a while, and it is possible there was a previous pub-
n for vehicle employees and for train service em-
s, and I rather think there was, but I'm not sure.

Those rules for each separate group—that is, the
f rules for the train service employees and book of
'or vehicle employees—those selfsame rules are in
k referred to as the General Rules and Instructions
loyees?

That is correct. Those specifically, I might say,
g to those two groups were published separately
venience.

Examiner Funk: One question, if you will par-
on me. Mr. Long, do you now have a new issue of
our book of rules and regulations?

Long: Yes, there is.

iner Funk: Are there any changes?

Long: Yes, there have been changes.

iner Funk: Are you going to introduce a copy
new one?

Long: If you wish. That was published last year

Morgan: Mr. Examiner, I want to get this clear,
ink I have developed that from Mr. Hall, for which

I am grateful. There is a book of General Rules and Instructions. For my purpose, I am talking about the last issuance of the book of General Rules and Instructions to all employees.

Examiner Funk: Is that the 1948 issue?

Mr Morgan: The 1948 issue, if there was an issue of 1948.

Q. That is the General Rules and Instructions to which I am addressing myself, Mr. Hall, and what you said in answer to that would be the same. Is that true?

A. No, sir. We did not withdraw the rules in the 1948 issue for vehicle employees and train service employees.

Q. You did not withdraw them?

A. No We did not put them into a separate publication.

Q. They are ail in one, then?

A. All in one. That is the reason I referred specifically to '36.

* * * * *

1825 Q. Well, now. Mr. Hall, I'm getting over into the classification of merchant agents. Should it develop that the merchant agents or these who assist them in their work would have a criminal record or a reputation that would be detrimental to the Express Agency, what would be the consequences of that? How would the Express Company handle that?

A. We would try to find someone else.

Q. Regardless of whether the merchant agent or someone working under him?

A. Well, certainly the merchant agent, if it was one of his employees—it would depend on circumstances, but I don't know that that information would come to us. It might.

Q. Well, I am assuming that it did.

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'ell, depending on the nature of it, Mr. Crawford, iat action we would take.

'ell, assuming it did develop that one of them had al record or a reputation of that kind, as I under- , then, the Express Agency would take action to e that man removed?

A. If it was my office, I'd find someone else.

Q. When you say "someone else," do you mean employee of the agent there or the agent himself?

'ell, if it was the agent, I would have to find an- ent.

ell, would you have the authority to discharge an of a merchant agent?

would not. The only recourse we would have to cancel the arrangement and set up another one.

it you would take steps and insist, would you not, man was taken out of the service of the merchant In other words, you wouldn't permit that to exist, u, if you knew that this particular employee had al record?

would depend on the nature of the case, Mr. l. A case of that kind would have to be handled erits. In my forty-four years of service, I have d a case of that kind.

ell, I am assuming a hypothetical question that se. Now, let's assume, too, that Railway Express ot a report that an undue number of claims were own in a particular agency resulting in claims d by the Agency. What action would the Railway Agency take toward instructing and supervising hant agent in order to eliminate these claims?

ell, that would depend on the circumstances. To th, there are very few merchant agencies that elop enough business to involve many claims.

Q. Well, of course, I am predicating my questions on ssumptions, but I think you will admit that they do happen.

A. They do.

Q. So I am assuming that such would happen. Wouldn't he Express Agency take ways and means to direct and nstruct and supervise that merchant agent until he did andle those shipments to eliminate the claims?

A. We would try to find out what was causing 827 the claims, where it was happening, and our investigation would govern our further action.

Q. And if it developed that he was not handling these hipments properly or handling them in a manner that aused these claims, then you would have the right to supervise him until he did handle them as instructed by the xpress Agency, would you not?

Mr. Long: I object to the question. The word "superise" is too broad. What does he mean there by supervise?

Mr. Crawford: Well, I think, Mr. Long, the word supervise" is so well known—

Mr. Long: Let's get down to facts.

Examiner Funk: Do you want to rephrase your queson, Mr. Crawford?

Mr. Crawford: Well, I can't pick out any particular se.

Q. My question is to assume that this merchant agent as not handling shipments according to instructions. ow, would you send a route agent out there or some presentative to stay with that man and instruct him to how to handle those shipments, according to the tar' and classifications, etc.?

A. Well, the route agent would probably be the first an that found it out, and just as I previously said, we ould try to determine where the trouble was, what caused and that would dictate what action we should take. It ould probably mean discontinuing that agency and setg up another one.

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e has been some testimony here, Mr. Hall—
ou heard it—where there are cases where the
oad and express agent gives up the agency for
n or other, and it is transferred over to a mer-
t. Now, when that is done, is there any change
hod of performance, of handling those ship-
hat is, any difference between the joint agent
rchant agent? I have in mind this. Suppose
ping—well, we get back to our baby chicks.
e been taking them to the joint agent, and this
ular day I am informed that he is no longer
ent, that John Doe is the merchant agent. Now,
baby chicks there. Is there any difference in
of performance of handling those shipments
gent to the other?

mean in the receipting for and handling?

lling them?

n't know that there would be any difference.
fice, I suppose, and the same class of traffic.

: When you say "same office," you mean the
r town?

Yes.

ford: I have no further questions.

enauer: I have one more question, Mr. Ex-

Funk: Mr. Hassenauer.

enauer: Mr. Hall, there is some considerable
on this record with respect to the severance
ur company and the merchant agent. What
now is whether there is any stipulated amount
t needs to be given by your company to a mer-
when you sever that business relationship.

No, there is no provision for a notice, unless
in some particular case.

Funk: Mr. Long?

Mr. Long: Yes. I think we haven't brought in one thing you want to get.

* * * * *

1831 By Examiner Funk:

Q. You testified, I believe, Mr. Hall, that you are familiar with the General Rules and Instructions issued by the Railway Express Agency, Inc.

A. Yes.

Q. Is there anything in these rules and regulations, Mr. Hall, that would identify particular rules as being applicable to various and specific types of agents?

A. No. Well, there are some things. Knowing the express business, you would realize the type of agent that it would be applicable to.

Q. Say, for instance, we have a man who just started to work for the Railway Express Agency as a merchant agent out here. Would he know which ones of the rules are applicable to him? Do you specifically point out the ones that are applicable to him?

A. Well, I never furnished the merchant agent with a copy of the General Rules and Instructions, because I felt that he had little need for them.

1832 Examiner Funk: Mr. Long, does my memory serve me correctly that when we had those merchant agents on the witness stand in August, there was some testimony to the effect that some of them did have General Rules and Instructions?

Mr. Long: Some of them do, yes. I don't know whether that has been uniform throughout the system. Some superintendents have furnished them, and some haven't. I think that most superintendents have.

Q. Going back to my question. Mr. Hall, this merchant agent out here is furnished with a copy of the General Rules and Instructions. Do you know whether or not h is advised that any particular rules are applicable to his work?

A. I don't know that he would be advised.

Q. Would you expect him to assume that all the rules and regulations were applicable to his work?

A. I wouldn't expect him to read them, Mr. Funk.

Q. Well, let's take up some of these rules and regulations. Rule 214, which may be identified as Rule 214 of Exhibit 8 in evidence at the first hearing. Will you read that rule, Mr. Hall, and tell me whether or not it would be applicable to merchant agents?

A. Well, as a practical matter, I would say it would be to some who had any volume of traffic, but in my experience there have been very few, if any, merchant agents that would delay a train. The volume wouldn't be sufficient.

Q. But suppose we would have a merchant agent out here, Mr. Hall, who has a lot of baby chicks in the baby chick season. Would you expect him to be prepared to load and unload express matter promptly so as to avoid delay of trains?

A. I would, yes, and he would understand he was supposed to do that.

Q. Is Rule No. 263 applicable to merchant agents?

A. Yes, I would say he would have to require proper identification of strangers.

1833 Q. Is he so advised by the Express Agency?

A. I presume his route agent would so instruct him, yes.

Q. Well, Mr. Hall, in the localities over which you have had jurisdiction, are merchant agents furnished with safes?

A. I don't recall any instance where we have furnished them with a safe. I might add they may have a safe in the conduct of their own business which would meet our requirement.

Q. Well, Mr. Hall, as I recall, last August there was some testimony by some merchant agents to the effect that they had safes.

A. Furnished by the Agency?

Q. Yes.

A. Well, there may be instances. I don't recall ever furnishing one.

Q. In the event that there was a merchant agency where the Express Agency furnished a safe, would Rule 622 be applicable?

A. Well, as to the location, I would say that would be up to the merchant agent in his place of business. The provision that it be kept locked should be complied with and he would be required to do that.

Q. The Express Agency would require a merchant agent to do that?

A. Yes. If we found it necessary to furnish him with a safe, we would expect him to use it for that purpose.

Q. Mr. Hall, in the agencies over which you had jurisdiction, did you ever furnish any of the merchant agents with pistols?

A. I don't recall ever furnishing any.

Q. Is it customary to furnish merchant agents with pistols or safes?

A. No, not as a general rule.

Q. In the agencies over which you had jurisdiction, did you have some merchant agents who handled shipments of money and valuables?

A. Oh, they handled some.

Q. Calling your attention to Rule 692, I ask you if that rule would be applicable to merchant agents.

A. No. We would never furnish a merchant agent with a safety seal.

1834 Q. How would a merchant agent be expected to handle a shipment of money or valuables?

A. Well, the only money that he would have to seal would be his remittances, express remittances, and he'd be furnished with a wax seal for that purpose.

Q. Would he be instructed how to use the wax seal?

A. Yes. I might say, too, that a great many merchant agents remit by mail.

Q. I am not talking about the remittances, Mr. Hall. I am talking about shipments. Say, for instance, out here there is a town in which there is a merchant agency, and that bank wishes to ship some money, or the jeweler there wishes to ship some watches.

A. They would seal it.

Q. The merchant agent would seal it?

A. The bank would seal it, or the jeweler would seal it.

Q. With his own seal?

A. Yes, sir.

Q. Were any of the merchant agencies over which you had jurisdiction, Mr. Hall, furnished by the Express Agency with these four-wheeled trucks?

A. I don't recall ever furnishing a merchant agent with a four-wheeled truck.

Q. You would say, then, it is not customary to furnish merchant agents with four-wheeled trucks?

A. Not customary. There are some exceptions, I presume. I think in a few instances we have furnished them with a small truck—a hand truck, we call it.

Q. In instances where you have furnished them with those trucks, could you look at Rule 891 and tell us whether it is applicable to merchant agents?

A. Well, if we furnished him with a platform truck, the route agent should instruct him as to the safety requirements of that rule.

1835 Q. Would the same be applicable to Rules 892 and 893 and 894?

A. Yes.

Q. Mr. Hall, in the agencies over which you had jurisdiction, did the Express Agency have occasion to furnish the merchant agents with scales?

A. There may have been some instances.

Q. In such instances, would you consider that Rules 1079 and 1080 were applicable?

A. Yes. If they were dial scales, these rules would apply.

Q. Even if it was a merchant agency?

A. Yes.

Q. Going back to an agency in which they'd have a safe, Mr. Hall, would you say that Rule 1092 would be applicable?

A. Yes.

Q. Mr. Hall, did any of the merchant agencies over which you had jurisdiction use pass bags?

A. No.

Q. Does the Railway Express Agency require its merchant agents to sign Form 95?

A. Yes, they would sign that.

Q. I believe there are certain instructions relating to methods and details on the back of the Form 95. Is that correct?

A. Yes.

Q. Would they be applicable to merchant agents?

A. Well, I'd have to see them to identify them. It has been so long. Well, the first division there limits the amount of cash that he can carry. That would be applicable. Instructions concerning remitting by first train to depository of the company would be applicable. Of course, sleeping in the office would be out, as far as a merchant agent is concerned. I would say the remainder of the
instructions would not be applicable to a merchant
1836 agent, certainly not the average merchant agent.
There might be some exceptions.

Q. Are you familiar with the Application for Employment?

A. Form 100?

Q. Yes.

A. Yes.

Q. Are you familiar with the form which was in existence prior to 1937? I believe that's right.

Mr. Long: Yes. There was one printed, I believe in 930, '31.

Q. Are you familiar with that form?

A. Is that the same form number?

Q. Yes, it has the same form number.

A. Yes.

Q. That form, which was Exhibit No. 11 in the first hearing, carried the following provision: "The Subscriber agrees that he will throughout his employment by the Company faithfully perform all of his duties, including the keeping of true and correct accounts of the business of the Company conducted by him or in his charge, all as required by the rules and regulations of the Company; and he understands and agrees that he is to be held personally responsible for the repayment to the Company of any and all losses which it may sustain through his failure to do so." I ask you whether or not that statement on the back of the Form 100 would be applicable to merchant agents.

A. Well, I would say it would be if he executed that form. I don't know of any case where we had a merchant agent execute an application. There may have been some exceptions, but I don't recall them.

• • • • •

1840 By Examiner Funk:

Q. Going now to merchant agents and their assistants, Mr. Hall, will you tell me the basis on which merchant agents are compensated for their work?

1841 A. A commission basis.

Q. Is there sometimes the provision that they were to have a certain minimum or maximum?

A. There are instances, perhaps, of that kind. I can recall none at this time.

Q. In other words, are there some who might be called limited commission agents?

A. You mean with a guarantee, so to speak?

Q. Yes.

A. I have never known of such cases with a merchant agent.

Q. Suppose we were to take an individual, and he is compensated on the basis of 10% commission on less-than-carload shipments, and 5% of gross earnings, with a maximum of five dollars a car on full carloads, but this commission would apply only on a certain percentage of the revenue on interline traffic. Would that be a typical merchant agent?

A. It would be unusual for a merchant agent to have carload traffic. There may be certain sections of the country where that might prevail. I never had it. He would probably be limited as to his percentage on interline business. That would have to be Canadian business, because our operation covers the entire United States, covering all railroads in the United States. Canadian business would be interline.

Mr. Long: And the agent's commission would apply only on that revenue accruing to Railway Express Agency over its own lines. Is that correct?

Witness: That is correct.

Q. Do you know of any merchant agents that are paid on a lump-sum or fixed allowance basis?

A. I don't know of any case of that kind in my territory where I was located, but it might be possible. It might be a contract arrangement, to pay him so much, regardless of commission.

42 Q. Do you ever, to your knowledge, have any arrangements whereby the compensation paid is taken into the account of a hotel, summer resort, or some- ing like that, rather than being paid to the individual ho performs the work or is designated agent?

A. I never had a case of that kind. There may be some.

Q. What is the usual commission basis?

A. The usual commission basis is 10%.

Mr. Long: Are you acquainted with the merchant geney on Mackinac Island, Mr. Hall?

Witness: No, I am not. That wasn't my territory.

Q. Were the agreements between your company and erchant agents generally written or verbal?

A. They were verbal.

Q. With respect to the agencies over which you had risdiction, did you ever have occasion to enter into a ritten contract with a merchant agent?

A. I don't know a single one.

Q. Does the Express Agency ever furnish desks to mer- iant agents?

A. I never knew of them furnishing any.

Q. Do they ever furnish tarpaulins?

A. Yes, sometimes they may be furnished.

Q. I believe you said that on occasion they may furnish iese small four-wheel trucks.

A. Yes. I have furnished them on occasion, and tar- aulins, if the traffic would justify for protection, might be rnished.

Q. Did the merchant agents in your territory have occa- ion to sell money orders?

A. I don't know of any instance where they ever sold ny. There may be some exceptions.

Q. Mr. Hall, you were present yesterday when Mr. Long ttempted to divide the agents into various categories, were ou not?

A. No, I wasn't. I wasn't here yesterday.

1843 Q. Category I would refer to your regular salaried employees, would it not?

A. Yes.

Q. Will you read category number 2, with respect to both "a" and "b" thereof, and tell me in your own words how the work performed by those agents differs from the work performed by merchant agents?

A. Well, generally, they have to put their entire time into the handling of express business.

Q. Let's take this group in category 2(a) first.

A. They devote all of their time.

Q. Is that the only distinction between them?

A. And their earnings are in excess of $125 per month. They are subject to the rules of the agreement of the Brotherhood of Railway Clerks. That means that the position would be subject to its rules and subject to bulletin bid in case of a vacancy.

Q. Does Railway Express Agency expect the individuals referred to in category 2(a) to devote the same care in the performance of express work as they would of individuals classified as merchant agents?

A. Well, they would devote their entire time to it. I would say they would give the business more care than the average merchant agent.

Q. Would you expect a merchant agent to be as careful in handling express work as one of these individuals in category 2(a)?

A. Well, we would expect him to use reasonable care, but after all, that is a sideline with him in most instances. It is, we might say, an auxiliary to his regular business.

Q. You would expect him to perform the common carrier obligations of the Express Agency?

A. Yes, we would, and my experience has been that in most instances the volume of business they handle is very

ll. They usually perform fair service, but not in all
s. We have our troubles. We have our troubles keeping merchant agents. Some of them stay on for years,
4 and some of them don't care for it, it is not interesting to them, and we have to make changes.

. Would your observations with regard to category
) be the same with regard to category 2(b)?

. Well, I would say so. They would give substantially
of their time to express service, but they may have a
ness of their own.

. Would you state that individuals described in cate-
es 2 and 3 are employees of Express Agency within the
ning of the Railroad Retirement and Railroad Unem-
ment Insurance Acts?

. That's 2 and 3.

. Right.

. I would say so.

. I call your attention to category number 4, Mr. Hall.
ld you state that the individuals described therein are
loyees within the meaning of the Railroad Retirement
Railroad Unemployment Insurance Acts?

. I would say so.

. Can you tell me how the work performed by these
viduals differs from the work performed by merchant
nts?

. Well, they are employed by a railroad company and
perform work for the Express Agency.

. Are there any other differences?

. Well, I am presuming the two employments would
substantially their whole time.

. I direct your attention to category number 5, Mr.
l, and I ask you whether the individuals therein are
sidered by you to be employees within the meaning of
Railroad Retirement and Railroad Unemployment In-
ance Acts?

A. Well, the employees listed in 5 are only employed part time by a railroad, as a caretaker, custodian, and their work for the Express Agency would, I presume, take only a small part of their time. I don't think that their status would be the same as those in 2 and 3 and 4. As to the application of the Act, I am not in a position to interpret that.

Q. Would you say that there was any distinction between the work performed by those individuals and the work performed by merchant agents?

A. Well, I'd have to know more about their employment. I am presuming that some of those caretakers and custodians are merchants who conduct a store, and the work they perform for the railroad and for the Express Agency is more or less incidental.

Q. Would you say their work is similar to that performed by a merchant agent?

A. To some extent, yes, if they are merchants.

Q. Would you say their work is similar to the work performed by joint agents?

A. No. A joint agent usually devotes his entire time to the railroad and express business.

Q. I direct your attention to category number 5, and ask you whether the individuals described in this category are the individuals that have been referred to on direct and cross-examination as merchant agents.

A. I would say yes.

Q. I direct your attention to category number 7, Mr. Hall, and ask you whether the individuals referred to herein are the type of individuals which have been heretofore referred to on direct and cross-examination as branch package receiving agents.

A. Yes.

* * * * *

Q. I recall that, I believe it was on cross-examination a while ago, you mentioned janitor service and ow washing. When you spoke of window washing by a contract with the company, were you referring larger centers?

Yes.

What happens in the small town where you just a merchant agency?

Then the window is not washed.

• • • • •

Q. I address your attention to category number 5, Mr. Hall, and ask you how the work performed by individuals differs from the work performed by mer- agents.

Well, I'd have to know something about the par- r office referred to—something about the duties.

You are not familiar with these particular offices ioned therein?

I am not.

Mr. Hall, are merchant agents ever accorded any of sual rights and privileges of an employee of Express cy?

They are not allowed vacations, not entitled to free portation.

Are they ever accorded the right of free transporta- Mr. Hall?

Not to my knowledge.

Do you know of any circumstances under which a hant agent might secure free transportation from the ess Agency?

I do not. I have never requested transportation for

marks off the record, at the request of Examiner .)

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853 By Mr. Hassenauer:

Q. Mr. Hall, in answer to a question propounded by the Examiner, you stated one or two occasions
854 which would indicate that merchant agents are not
eligible to employee privileges. I'd like to ask, in ddition to your answer, as to whether or not merchant gents or their employees are eligible for group insurance.

A. No.

Q. Are the merchant agents entitled to any seniority ights?

A. No.

Q. You testified also, in a reply to a question asked you y the Examiner, that in your territory when you were uperintendent you did not exact any application for employment or a bond from these merchant agents. Now, in he re-hearing held in 1938, Superintendent Huff of your Iaryland-Pennsylvania District testified that in his disrict all merchant agents signed an application for emloyment. Is that matter of asking for an application for mployment and execution of fidelity bond left entirely y the management to the discretion of the superintendent his district, as to whether or not he will ask for such a ond when the route agent makes a contact with a merhant agent?

A. What year was that, Mr. Hassenauer?

Q. That was 1938 when Mr. Huff testified at the reearing in this matter.

A. Well, I wouldn't say it is left entirely to the disretion of the superintendent, but there are a lot of differnt practices, perhaps, in different territories. I never id require them.

Q. I want to call your attention also to the fact that this same rehearing you had a merchant agent by the ame of Roberts, who had a business establishment in Georia, who testified that he was requested by the route agent

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ich an application for employment. It would ap-
the southeastern territory that was the policy of
agement to request that application of employment
se merchant agents.

would, and it may in some sections of this ter-
e done, but I never have done it.

Ir. Hassenauer: That's all.

Mr. Long:

Q. Were you ever censured for not requiring that,
l?

o.

obody ever questioned your practice. Is that

hat is correct.

ong: That's all.

* * * *

Q. Mr. Hall, I have just one more question. I
't recall if the Examiner asked you with refer-
Rule 510. Would you read the rule and state
or not that is applicable to merchant agents?

would say it was. It is protection of traffic.

those places where merchant agents do the pick-
delivery, as has been testified they do, does the
Express Agency require that particular agent to
truck in such a way as to protect shipments from
conditions, such as rain, etc.?

ell, I would say they do.

rawford: That is all for me.

ner Funk: Mr. Long, any further questions?

ong: No, no further questions.

ner Funk: Mr. Hassenauer, do you have any
questions?

assenauer: Mr. Hall, during your experience as
endent, where no fidelity bond was requested of

merchant agent in your territory, do you recall of any
stance where any of these merchant agents were guilty
any embezzlement or defalcation of any of the com-
ny's funds?

Witness: No, I do not.

Mr. Hassenauer: That's all.

(The hearing recessed at 4:45 P. M., March 15, 1949.)

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59 MR. G. C. LACE was recalled for examination and testified as follows.

• • • • •

70 Q. Taking the category subheadings listed under category 2, can you tell me how the work performed
these agents differs from the work performed for the
xpress Agency by merchant agents?

A. We control the manner in which the work is per-
rmed by the individuals in categories 2(a), (b) and (c).

Q. Well, is there any difference in the actual work,
itside of the controlling, as you say?

A. In the issuance of a receipt, no, there would be no
fference. Checking the money, it is checked in the
me manner.

Q. Do you expect from them the same type of service
ou would expect from the merchant agent?

A. We expect a higher type of service from them, and
perience has shown that we do get it.

Q. What do you mean by "higher type of service,"
r. Lace?

A. Service rendered at a time that is best suited to the
eeds of the customer.

Q. Do any of these individuals in categories 2(a),
871 (b) and (c) perform pickup and delivery service, if you know?

A. Ye

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A. Oh

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—the one I referred to.

an for the Express Agency.

for the Express Agency. Yes, sir.

e considered an employee with respect to his
l delivery service?

I would say so.

he use his own truck?

The agent at Farmington to whom I referred
is own truck.

* * * *

I believe you testified there is no difference
en the forms completed by a joint agent and
completed by a merchant agent?

nk I said that there is very little, if any, differ-

hat you testified with respect to the forms com-
merchant agent in comparison with the forms
by individuals in categories 1 and 2 would be
vith respect to individuals herein described in
?

I think so.

* * * *

Ir. Long:

Lace, is the joint agent required to be at the
g stipulated hours?

s.

e merchant agent himself required to be at his
g any stipulated hours?

s not.

r Funk: Who sets those hours they require
gent to be there at a specific time?

The railroad employer.

* * * *

1876 Q. The only difference between a merchant agen and a custodian agent, Mr. Lace, is that the custodia agent operates his agency on railroad premises and als performs some service for a railroad. Is that correct

A. That is correct.

Examiner Funk: Mr. Long, in examining your categories, it appears that in category number 5 and category number 9 in particular, there is some overlapping.

Mr. Long: That is true.

Examiner Funk: Can you straighten out that overlapping?

Mr. Long: Yes. I think category number 9 should be added to category number 5, as a subdivision of it. In other words, you might subdivide 5 as: (a) Those individuals who operate the express office on premises controlled by Railway Express Agency through lease or ownership, and (b) Those individuals described in express circles as caretaker agents or custodian agents, who operate the express office on railroad premises.

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1878 Q. Take the category in which Mr. Harrison has been placed. Do you consider that individuals in that category perform a higher type of service than individuals performing service as merchant agents?

A. Yes, I do.

Q. What is your basis for your statement, Mr. Lace?

1879 A. Well, so long as we control the premises in which the operation is carried on, we can demand the type of service which we desire.

Examiner Funk: Proceed.

By Mr. Long:

Q. Mr. Lace, do you know of any examples in category 6(a)?

A. Yes. Agent Jordan at Fremont, Michigan is one example.

Q. Is he the same Jordan who testified here last August?

A. He is. Also agent Horton at Nauvoo, Illinois.

Q. Is he the same Horton who testified here last August?

A. He is. Also agent Westfall at Newberry, Indiana.

Q. And he likewise testified here last August?

A. He did. The Logan Council of Slagle, West Virginia.

Q. Now, that corporation didn't testify here last August.

A. No, it did not.

Examiner Funk: Do you know whether or not the agreement there is between the corporation and Express Agency or between the Express Agency and some individual in the corporation?

Witness: It is between the Agency and the corporation.

Q. Now, do our exhibits designate the individual who has been doing the work, or the corporation, or do you know?

A. I do not know.

Mr. Long: I may say for the record that the individual is designated in the record as the party who has been reported to the Board. I think it grew out, perhaps, from this Loma Linda case.

Examiner Funk: When you say Loma Linda, Mr. Long, are you referring to an institution that was discussed in some Opinion of the Railroad Retirement Board or its General Counsel?

Mr. Long: Yes, I am.

Q. You heard the testimony last August of these various agents who acted as merchant agents for Railway Express Agency, did you not?

A. I did.

1880 Q. And their testimony, in your opinion, described the work they performed for Railway Express Agency and their obligations to Railway Express Agency?

A. It did.

By Examiner Funk:

Q. Do you consider these merchant agents described in category 6(a) to be official representatives of the Express Agency in the localities where they perform their work?

A. Yes, sir.

Q. With regard to category 6(b), do you have any examples, Mr. Lace?

A. Yes, I do. Dr. J. A. Smith, Mount Wilson, Maryland, who is in charge of the Mount Wilson Sanitarium.

Mr. Long: Do you know whether Dr. Smith himself actually does the physical work in handling the express there?

Witness: It is my understanding that he does not.

Q. Are you familiar with the operations there?

A. Through investigation, somewhat familiar with them.

Q. Who does perform the work there?

A. Employees of the sanitarium.

Examiner Funk: Who have been reported to the Board as employees, Mr. Long?—Dr. Smith or his employees?

Mr. Long: J. A. Smith is reported.

Examiner Funk: That is the Dr. Smith whom Mr. Lace has mentioned.

Mr. Long: Yes. The doctor himself is the named agent.

Q. Was the agreement made with Dr. Smith, as the individual, or was it made with the corporation?

A. With Dr. Smith.

Mr. Long: Do we know the names of the employees of the institution who actually perform the work?

Witness: No, we do not.

1881 Q. Do they complete the same forms that are normally completed at a merchant agency?

A. They do.

Q. Are the incidents of their relationship with Express Agency the same as other merchant agents?

A. Yes, sir.

Mr. Long: Well, that is a rather broad question, Mr. Examiner. I just don't get the purport of it.

Examiner Funk: The only thing I am trying to develop there, Mr. Long, is there any difference in their incidents with relationship to Railway Express in performing express work between them and the other merchant agents?

Mr. Long: Between them and other individuals who perform work at a merchant agency.

Examiner Funk: Yes, that will be all right.

A. No difference.

Q. I draw your attention to category number 6(e), Mr. Lace.

A. A housewife, Lottie Davis, is employed as our agent at Mount Vision, New York.

Q. Have you conducted any investigation with regard to the work performed there, Mr. Lace?

A. Yes, I have.

Q. Will you tell us the results of your investigation?

A. The investigation discloses that this housewife devotes a few minutes a day to the handling of express matter.

Mr. Long: Does your investigation show the approximate average number of shipments that she handles?

Witness: Yes. It shows that she handles about six shipments per day.

Mr. Long: Now, does your investigation show where the express agency is handled?

1882 Witness: In her residence.

Q. How much time did Mr. Smith or his employees or assistants devote to merchant agency work?

Mr. Long: Will you give the approximate number of shipments they handled a day?

A. About one shipment per day, and only a few minutes reported.

Q. I direct your attention to category 6(d). Do you have an example of that?

A. Yes. V. C. Perkins, the agent at Fire Creek, West Virginia. The express business at that office is conducted on the premises of Mr. Perkins' employer, the Fire Creek Coal Company. He handles approximately four shipments per day, and he devotes an hour or less per day to express.

Q. Is he compensated for that service by the Express Agency?

A. He is.

Q. Does he turn it over to the coal company or retain it?

A. That, I do not know.

Q. You pay him?

A. We pay him.

By Mr. Long:

Q. What is the basis for the payment—a percentage basis or what, Mr. Lace?

A. It is on a percentage basis.

Q. That is, 10 percent?

A. Yes, 10 percent.

Q. And what is the percentage paid the housewife?

A. That is 10 percent.

Q. And the doctor?

A. Ten percent.

Q. And the others, I think, are in the record already.

883 By Examiner Funk:

Q. Mr. Lace, with regard to all of these merchant agents, hat contacts do they have with officials of the Railway xpress Agency?

A. The route agent should solicit the office occasionally, nd perhaps infrequently a superintendent will visit the ffice.

Q. Have you ever had occasion to visit such an office, Ir. Lace?

A. Yes. I have visited the merchant commission office t Carrollton, Illinois, as a superintendent; as a route gent, I visted the merchant commission offices at Good lope, Sciota, Blandinsville and La Harpe, Illinois.

Q. And what do you say to them on these visits?

A. As a route agent, when I visited the four offices ientioned, I'd ask them where the abstracts and bills were, nd if they didn't know, I'd start looking for them so iat I could make up the reports for them.

Q. Where would you look, Mr. Lace?

A. I'd look all over the back room of the place, and the ront room, and all over.

Q. Mr. Lace, are these individuals furnished with copies f the General Rules and Instructions of the Express gency?

A. Some of them may have been furnished copies.

Q. Do you send them any circular letters of instruction, Ir. Lace?

A. Yes. When circular letters are issued, for ease of istribution in many cases, we make it just all agents and t them go to all offices.

Q. Would that include branch agents?

A. No, we do not have those agents on any mailing st because they are generally located within another gency and it would mean extra mail service to them.

Q. But you do send them to the merchant agents?

A. Not all circulars, but certain circulars we do.

Q. What is the nature of some of these circulars you send the merchant agents?

1884 Mr. Long: I think we had one very recently, didn't we, Mr. Lace, with respect to the embargo in New York City because of the strike?

A. Yes, and a circular was being issued yesterday in regard to the embargo of certain railroad offices.

Q. Mr. Lace, do you ever have occasion to send out circulars and letters of instruction with regard to the solicitation of business for Railway Express Agency?

A. Yes, sir.

Q. Are such instructions or circulars sent to the merchant agents?

A. Not generally. Perhaps some information about solicitation or bus development might be included in a letter covering other subjects. In other words, when we issue these general circulars, we usually fill up the page and perhaps there might be one subject on the page that would be of importance only to certain offices, but for easy distribution—

Q. Well, do these merchant agents, Mr. Lace, have any way of knowing what is applicable to them?

A. Well, it has been my experience with the merchant agents that they don't even open the envelopes.

Q. Mr. Lace, did you ever have occasion to set up a merchant agency?

A. No, I did not. All of the merchant agents over which I had any jurisdiction were established prior to my taking over the work.

Mr. Long: I might say Mr. McAdam had occasion to set one up since the last hearing, if you'd like to talk to him about it.

Examiner Funk: A little later. Proceed at this time, Mr. Long.

Ir. Long:

Mr. Lace, you mentioned visits at Carrollton, Illinois. n you made those visits, who was the merchant agent at point?

Mr. Simpson.

Do you know whether Mr. Simpson still represents us as agent at Carrollton?

A. He no longer represents us there.

Q. Do you know who represents us at Carrollton

An agent by the name of Becker.

Did he take over when Mr. Simpson discontinued senting us?

He took over the express work.

That's what I mean—the express work. Now, do know who is employed by Mr. Becker to assist him e conduct of the express business?

Yes. He employs his brother to perform the pickup lelivery service, and a sister to assist him in prepar- he reports.

What is Mr. Becker's regular business?

He owns and operates a gasoline filling station and nobile repair shop.

In your testimony previously given, you mentioned ssistants of Mr. Simpson. One of them, I recall, was s. Imus. Do you know whether any of Mr. Simpson's tants continued to perform any express work after Simpson discontinued acting as agent?

No, they have not performed any of the express since Mr. Simpson discontinued that arrangement.

So they were Mr. Simpson's employees.

They were.

And they discontinued doing any work at all for Express Agency when Mr. Simpson left the agency.

That is correct.

Examiner Funk: Mr. Lace, referring to Mr. Simpson, do you know whether or not he completed an application for employment with the Railway Express Agency?

Witness: No, I do not.

Examiner Funk: Do you know anything about any prior service which he may have rendered?

Witness: No, I do not.

• • • • •

1887 By Mr. Long:

Q. Mr. Lace, I show you the questionnaire completed by Mr. Simpson in 1946, and direct your attention to question No. 41, reading—

Examiner Funk: What is the exhibit number?

Mr. Long: No. XXIX.

Q. That question reads, "What were the facts and circumstances which led up to your taking on the express business," and I ask you what Mr. Simpson's answer thereto was.

A. His answer was, "Don't know. Too far back. My father was agent at that time. I took his agency when he retired."

Examiner Funk: Speaking generally of the merchant agents with whom you have had contact, Mr. Lace, can you tell me whether or not you know of any instances where the merchant agent has formerly been a salaried employee of Railway Express Agency or a salaried employee of the railroad or a joint agent for the railroad?

Witness: No, I do not.

• • • • •

1897 Q. Directing your attention to category number 11, formerly category number 12—

A. Individuals employed by merchant agents?

Q. Yes.

A. Yes. The employees o. Mr. Simpson, our former

Carrollton, and the employees of Mr. Becker, our
agent at Carrollton, would come within that cate-

nd they are paid, I understand it, by the merchant

hat is correct.
nd who selects those in category number 11, for-
umber 12?
he merchant agent.
as Express Agency anything whatever to do with

A. Nothing whatever.
Q. Has Express Agency anything whatever to do
th the determination of their compensation for the
or work they perform?
o, nothing whatever.

* * * *

ong: Mr. Examiner, I offer in evidence Exhibit
I, which is a booklet entitled "General Rules and
ions, Railway Express Agency, Incorporated,"
ew York, July 1, 1948.
iner Funk: It will be so accepted.
booklet above described by Mr. Long was received
nce as EXHIBIT XXXVII.)
iner Funk: Mr. Crawford?
rawford: Just a couple questions.

Crawford:

r. Lace, I understood, in reply to the Examiner's
with reference to the number of hours approxi-
ut in by joint railroad and express agents—that
ining to express work, and then the merchant agent
k you said the average for the joint agent would
ximately two hours, and the merchant agent one
Does that pertain to your particular territory, or

d you wish to convey the thought that merchant agents n the average, nation-wide, only put in one hour a day?

899 A. My answer, Mr. Crawford, was predicated on agencies with which I am familiar.

Q. Well, the reason I asked that question was that a ood many of the other witnesses that testified as merhant agents, which you say are represented in the cateory there, testified they made over $300 a month, $200 month, and one or two said they worked an average of ur, five hours, so you didn't mean to say that would be e average throughout the country.

A. No.

Q. There was a question asked here—I think both of r. McAdam and yourself—on several occasions, with ference to the fact that the merchant agents retained the ys to their premises. I assume by that you mean if u were a route agent or Mr. McAdam as a route agent ent into the merchant agency and the office was closed d you wanted to make a check, you would then have to t the key from the merchant agent. Was that the point?

Mr. Long: From the merchant agent, Mr. Crawford?

Mr. Crawford: Yes. He said the merchant agent reined the key to the premises.

Q. Was that it, Mr. Lace?

A. Well, that is true. The merchant agent controls s premises. We couldn't ask him to let us in there after urs.

Q. The point I wanted to clear up was, that applies also exclusive commission agents and salaried agents. In her words, the route agent doesn't have the keys to all e offices in your territory, does he?

A. No, but we could get them, and we could go to the me of an exclusive commission agent and get the key d then go back to the office, whether he is there or not, d then do our work.

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ell, you could also call at the home of the merent, could you not, and in an emergency to make or something of that sort?

. We could. Whether he would supply it or not. on't know. I wouldn't want to ask him to let me into his office alone, in a jewelry store or some- that.

awford: That's all.

ong: I have no further questions.

iner Funk:

. Lace, showing you Exhibit XXXVII, I ask you or not merchant agents have been furnished with bit.

me of them may have been.

u do not know, of your own knowledge?

, I do not know of my own knowledge.

n you tell us whether there are any changes be- is and Exhibit 8 introduced at the first hearing orted to be a copy of the General Rules and In- s of the Express Agency then in existence?

ere have been some changes. New rules have ed and old rules have been deleted.

ould the testimony heretofore given at this hear- respect to Exhibit 8 and certain rules therein be pplicable with respect to this exhibit?

s, and I might add that, insofar as possible, in this edition they maintained the same rule num- ouldn't be done all the way through, but that was attempted to do.

• • • •

1917 MR. PAUL GROSS, JR. was recalled for examination and testified as follows:

Direct Examination by Mr. Long.

Q. Mr. Gross, I believe you have testified before in this proceeding?

A. I have.

* * * * *

1919 Not until the advent of the Railroad Retirement Act and the Unemployment Insurance Act was it essential for the accountants in the express service to distinguish between the various classes of commission agents to develop their relationship with the express company. Then when that became necessary, to make that distinction or differentiation, we found these many different categories of agents, some of them called joint railroad commission agents, some merchant agents, branch agents, and these various other categories to which we have referred in this matter. I would like to address myself primarily to the branch agents.

* * * * *

1924 Q. Mr. Gross, I show you Exhibits XXXIX-A, B and C, and ask you to explain the use they are put to by Railway Express Agency.

A. The exhibits marked XXXIX-A, B and C for 1925 identification constitute a copy of Circular No. 93-A—Commission, and amendments Nos. 2 and 3 to that circular, issued by the General Accounting Department of Railway Express Agency, effective January 2, 1945, and, as the cover indicates, include the general accounting instructions for commission offices.

Q. I direct your attention to the fact that amendment No. 2 has in the title the words "(Cancels Amendment No. 1 dated January 15, 1947)", and ask you if you know whether Exhibits XXXIX-A, B and C are those which are presently effective.

A. They are.

Q. To what offices, Mr. Gross, are Exhibits XXXIX-A, B and C distributed?

A. The circular 93-A—Commission is distributed to all commission offices, and when I say all commission offices, they include all offices paid on a commission basis, as distinguished from offices the employees of which are paid on a salaried basis.

Examiner Funk: Suppose the agent there is paid on a fixed allowance basis?

Witness: It would be a commission office.

Q. When you refer to offices in the testimony you have just given, you do not, I understand, include branch package receiving agents.

A. I do not.

• • • • •

1926 By Examiner Funk:

Q. Railway Express Agency expects its commission agents to follow these instructions?

A. That is correct. The directory does not show branch agents, nor do such so-called branch agents as we have discussed them here prepare the reports and statements and balance sheets that are prepared by commission offices in general. Consequently, these instructions do not go to such branch agents.

Q. Mr. Gross, I direct your attention to Exhibit No. 12, which is a blank copy of Railway Express Agency Form 96-B, Monthly Balance Sheet, Commission Office, and ask you what purpose that exhibit serves in the express industry.

A. The term "balance sheet"—I think I testified to this previously, Mr. Examiner—the term "balance sheet" is a misnomer. A balance sheet as we know it in the accounting profession is a statement of assets and liabilities. There again, it is a term that has been carried forward from one of the old express companies. In the case of the Adams Express Company, we referred to it as a summary of account, and that is what it was in fact, a summary of account, a report on which the agent summarizes his debits and credits, on which he shows the amount of express charges he is due to settle to the express company, on which he takes credit for remittances of those express charges which he has collected which he remits to the company's depositories. It shows also the amount of commission which he takes credit for, and that is taken credit for automatically. He reduces the amount that he collects by the amount of his commission and remits the balance.

By Mr. Long:

Q. It is then a statement of debits and credits between Railway Express Agency and the particular commission agent.

A. That is correct. I might add at this point that the net amount of commission only is carried in his account
to the accounting department. Inasmuch as we have
1927 had to make deductions for Railroad Retirement Tax,
for income tax withholdings, we have had to provide
for that on forms 7050 and 7051, and they underlie this balance sheet to the accounting department—the so-called balance sheet or summary of account to the accounting department.

Q. Do you know, Mr. Gross, the time or the approximate time when we required 7050 and 7051 from merchant agents?

A. I cannot answer that.

Q. Was it before or subsequent to the Order of the Railroad Retirement Board directing that merchant agents were employees of Railway Express Agency within the meaning of the Railroad Retirement Act and related acts?

A. It was since then, but I don't remember what year hat was.

Q. Subsequent to that time.

A. That's right.

Q. Mr. Gross, I show you Exhibits XL-A, B and C, and sk you what those exhibits are.

A. Exhibits marked XL-A, B and C for identification re the original forms 7050 submitted by the agent at parta, Illinois, being for the periods from February 1, 948 to February 29, 1948, March 1, 1948 to March 31, 1948, nd April 1, 1948 to April 30, 1948.

Q. And who is the agent there?

A. A. H. Burns, and his Social Security number is 20-09-6890.

Q. Now I ask you, Mr. Gross, whether Mr. Burns made ny deductions from his gross commissions for any expenses whatever on Exhibits XL-A, B and C.

A. I should further have described Form 7050 that it a form showing the receipts and expenses of commision agents. These three forms, Exhibits XL-A, B and C, ow no deductions for any expenses incurred by Agent urns at Sparta, Illinois, and no deductions for wages paid by that agent during those months.

928 Mr. Long: Will Exhibits XL-A, B and C be accepted in evidence?

Examiner Funk: They will be so accepted.

(Original Forms 7050 of Railway Express Agency, subitted by the agent at Sparta, Illinois, A. H. Burns, for e months of February, March and April, were received evidence as EXHIBITS XL-A, B and C.)

Mr. Long: There are no further questions.

Examiner Funk: Mr. Hassenauer?

* * * * *

1936 MR. A. H. BURNS was recalled for examination and testified as follows.)

Direct Examination by Mr. Morgan.

Examiner Funk: Do you wish to make any opening statement, Mr. Burns?

Witness: The statement I wanted to make was, at the hearing—when was the last hearing?

Mr. Long: August.

1937 Witness: At the hearing in August, I was questioned at length as to whether I was instructed with reference to what I should do with equipment and property at Sparta. Now, I have some letters which are addressed to me as A. H. Burns, Agent, Sparta, Illinois, instructing me what to do with property at different times.

Q. Will you identify the letters?

A. Here is one written in Mexico, Missouri, on April 25, 1924, to A. H. Burns, Agent, Sparta, Illinois: (Exhibit XLI-A read).

Examiner Funk: Mr. Burns, do you intend to introduce these letters as exhibits?

Witness: I can.

Mr. Long: I'd like to have an opportunity of looking at them, if I may. Even if he uses them for refreshing his recollection, I'd like to have the opportunity.

Q. Mr. Burns, I observe that there are two or three documents appended to that letter you have identified. What is the importance attaching to those forms? Will you explain that for the benefit of the record here?—In other words, what does each one of those forms you have attached—there seems to be three of them—what do they mean? What importance do they attach to the letter?

A. I have a bill of lading, Missouri-Illinois Railroad Company of Sparta, Illinois, dated May 7, 1924, from the merican Railway Express Company, consigned to Agent, merican Railway Express Company, Coulterville, Illiis, one four-wheel truck, No. 3520, 600 pounds, deadhead, count American Railway Express. (Exhibit XLI-D.)

Q. Does that mean that the railroad carried that fourieel truck, or transported it, as the case may be, deadad, without any cost to you, as agent?

A. That's right. I signed the bill of lading as Amerin Railway Express Company, A. H. Burns, Agent.

On June 3, 1924, I received a copy of receipt of 38 this equipment to Mr. A. J. Jones, Superintendent, St. Louis, Missouri: (Exhibit XLI-C read).

Q. That is, you, as agent, could make requisition upon e Express Company for new equipment or a new fourieel truck. Is that what that form means?

A. Well, that form means our superintendent could ike it for our office.

Q. But that you were free to secure from the Express mpany new equipment without any cost to you, as agent.

A. That's right.

Mr. Long: That is, new equipment as far as the fourieel truck is concerned.

Mr. Morgan: I would accept Mr. Long's observation.

A. On July 8, 1924, we received a four-wheel truck, No. 782, shipped from Chicago, Illinois, H. McFarlane & mpany shipper, deadhead, company business, received A. H. Burns, Agent (referring to Exhibit XLI-B).

Q. Now, that was the new equipment, or the four-wheel ick that was intended to replace the one which Supertendent Jones had said to you in his earlier letter had en worn to such an extent that it was impossible to pair. Is that correct?

A. Superintendent Blakely, Chicago. Jones was my perintendent.

(EXHIBITS XLI-A, B and D were received in evince.)

A. On January 2, 1934: (Exhibit XLII-E read).

Here is a copy of a letter to Mr. F. G. Dralle, Route Agent, St. Louis, Missouri, February 1, 1934: (Exhibit XLII-B read).

Examiner Funk: Who is that signed by?

Witness: That's a letter I wrote to the route agent, signed by me.

(Exhibit XLII-A read.)

Q. What is the date of that letter?

A. February 2, 1934.

1939 Q. Let me ask you, Mr. Burns—I want to see if I understand the importance of these letters which you have read into the record. First, the route agent asked you to send one of the trucks you were using in your operation there for the handling of express, to the express agent at Evansville, Illinois, and the route agent is your superior. Is that correct?

A. Yes.

Q. And in compliance with his request, you sent the truck. Is that correct?

A. That's right.

Q. And the agent at Evansville, Illinois acknowledged receipt of that particular truck, and that is what those letters are intended to cover. Is that right?

A. Yes, sir—to set up that I was an agent.

(EXHIBITS XLII-A, B, C, D and E were received in evidence.)

A. This is from Mexico, Missouri, September 23, 1922: (Exhibit XLIII-A read.)

Mr. Long: Was this a four-wheel truck, Mr. Burns?

Witness: Yes, sir.

Mr. Long: A four-wheel platform truck, I take it.

Witness: Yes, sir.

A. From Sparta, Illinois, October 12th.

Mr. Long: What year is that, please, Mr. Burns?

Vitness: 1922. (Exhibit XLIII-B read.)

EXHIBITS XLIII-A and B were received in evidence.)

Q. This exhibit is purported to show that you were rying out instructions with respect to the handling of t equipment on that occasion, the same as was intended your introducing of the two previous exhibits. Do I lerstand you correctly?

Ir. Long: Well, now, I object to the form of the ques- 1. The exhibits speak for themselves, and the word "instructions" there—

0 Mr. Morgan: I think perhaps Mr. Long's analysis of my cross-questioning is correct, Mr. Examiner, I was trying to save the record. Let me ask you this, Burns. This letter written you by the route agent, W. Clark, dated September 23, 1922, you regarded as lirection to send a four-wheel truck to the agent at insville, Illinois. Is that correct?

. That's right.

. And you did so in compliance with that letter, and r letter of October 12, 1922 is intended to indicate that complied with those instructions. Is that correct?

. Yes, sir.—What I want to establish is that I was agent working under instructions, and addressed as 1.—Here is a letter addressed to Mr. A. H. Burns, nt, Sparta, Illinois, copy to A. H. Jones, Superintend- copy to C. R. Carlson: (Exhibit XLIV-A read.)

r. Long: What is the date of this, Mr. Burns, please?

'itness: January 10, 1930.

. Here is a copy of a letter to them, Sparta, Illinois, il 14, 1930: (Exhibit XLIV-B read.)

. That flat top desk referred to in Exhibit XLIV-A B was a desk that had been furnished you by the ress Company for the conduct of the business at Sparta, iois?

. Yes, sir.

EXHIBIT XLIV-A and B was received in evidence.)

Examiner Funk: Do you have any further statements you wish to make, Mr. Burns?

Witness: No, sir.

Examiner Funk: Mr. Morgan, do you wish to ask any questions?

Mr. Morgan: Yes.

Q. Mr. Burns, when you appeared here before, I think my recollection is correct, you were agent for the Railway Express Agency at Sparta, Illinois. Is that correct?

1941 A. Yes, sir.

Q. Are you still?

A. No, sir.

Q. What has occurred to that agency?

A. It has been set up as an exclusive agency by the Express Company, and they have an office at the G, M & O Railroad Company's depot.

Q. Did you voluntarily give up the office, or how did that occur?

A. Yes, sir. I wrote them a letter resigning as of November 1st, and I was relieved December 14th.

Q. Tell us a little more about that transaction, if you will, Mr. Burns—the actual mechanics of your being relieved as agent there at Sparta, in respect to being checked out. Your familiarity with the requirements of the Express Agency will enable you to understand undoubtedly what I mean, and I want you to tell us, if you will, if you were checked out, and if so, by whom, etc.

A. I was checked out by R. Howell, Route Agent. The accounts were checked and turned over to the new agent, Bob Hurtig.

Q. Spell that, please.

A. H-u-r-t-i-g.

Q. Now, had this particular route agent been in your vicinity long?

A. Yes, sir—a number of years.

Is this the same route agent who had previously ked your operations?

Yes, sir. We continued to service delivery for a x after that, until they got their new truck. The truck rvisor got a truck to Sparta.

r. Crawford: Mr. Burns, what we really wanted to v is, during the time in which you were agent for the way Express Agency, you were, I assume, checked odically by the route agent?

itness: Yes, sir.

Mr. Crawford: That's all.

Examiner Funk: Mr. Hassenauer, any questions of the witness?

r. Hassenauer: I think I'll follow Mr. Long.

Cross-Examination by Mr. Long.

Mr. Burns, you testified concerning four different sactions concerning four-wheel trucks. I take it that f those four-wheel trucks were platform trucks, were not?

Yes.

And they were all owned by Railway Express cy, were they not?

Yes, sir—whatever the Express Agency was at that

Either American Railway Express, the predecessor ilway Express Agency, or Railway Express Agency.

Yes.

What desk were you using for the transaction of ss business after you shipped out this flat top desk?

The date of that letter was what, can you tell me?

January 10, 1930.

Desk No. 603978.

What kind of a desk was that?

Flat top desk.

Q. Now, how many desks were you using in the transaction of your express business on January 1, 1930?

A. I would say we were using this desk and this desk.

Q. Two desks?

A. Yes.

Q. Now, do your records show when those desks were received by you?

A. That's not definite here.—The desk 603978 was received on November 11, 1924.

Q. And how about desk 4733?

A. Well, apparently it was there when I was checked in.

1943 Q. That was in 1914?

A. Yes, sir.

Q. Now, you have testified that as of November 1, 1948, you notified Railway Express Agency that you would no longer serve there as merchant agent. Is that true?

A. I tendered my resignation, yes.

Q. That was in writing, was it?

A. Yes.

Q. Have you got a copy of that?

(A paper was handed to Mr. Long by Mr. Burns.)

Q. The letter that you wrote resigning as agent at Sparta is dated October 11, 1946, is it not?

A. Yes, sir.

Q. And in that letter you advise that you wish to discontinue as agent as of November 1, 1948. Is that right?

A. Yes, sir.

Q. And when did you discontinue as agent?

A. December 18th, I believe.

Q. Now, when you were here last August and testified, you advised, as I recollect, that your son and daughter performed some of the express work. Am I right on that?

A. I advised that the daughter did, but the son, if it was necessary to help or something, would.

Q. And then you had one employee who drove the kup and delivery truck, did you not?

A. Yes, sir.

Q. And I believe that employee performed other exss work in addition to the pickup and delivery work, he not?

A. Yes, sir.

Q. Now, what was that employee's name?—Mulholland, s it?

A. Earl Mulholland, yes.

4 Q. Is Earl Mulholland still your employee?

A. Yes, sir.

Q. Does he do any work for Railway Express Agency y?

A. No, sir.

Q. Do your daughter or your son do any work for lway Express Agency now?

A. No, sir.

Q. Did they discontinue doing work for Railway Exss Agency as of the same time that you discontinued agent?

A. Well, they were not employees of the Express Comy.

Q. Will you please answer my question?

A. What was that question?

The last question asked by Mr. Long was read by the orter.)

. They discontinued doing that work for me.

. In other words, they were not Railway Express ency employees, were they?

. No, sir.

. They were your employees, were they not?

. Yes, sir.

. But for you they performed some express work.

. Yes, sir.

Q. Did they perform any express work after you discontinued being agent there?

A. No, sir.

Examiner Funk: Pardon me just a minute. Didn't you state, Mr. Burns, that the pickup and delivery work was continued for a week after the rest of the work?

Witness: After the agency was transferred to the agent, yes, sir.

Examiner Funk: Is it possible that Mulholland continued any express work after your discontinuance of service?

1945 Witness: Yes, sir.

Q. That work by Mr. Mulholland was for you, as your employee, I take it.

A. The work that continued after the agency—we made the deliveries of express.

Q. When you say you made the deliveries, you mean that you, as representative of Railway Express Agency, continued to make the deliveries for a week. Is that true?

A. Yes, sir. We made—

Q. That's all I want. And Mr. Mulholland, as your employee, continued to perform that pickup and delivery service during that week. Is that true?

A. I don't know that that is true. The agent that was appointed may have taken the truck and made the delivery, which I think he did. He took our truck and made the deliveries after he was appointed, as his truck had not been brought to him.

Q. Well, do you know or do you not know?

A. I'm not sure all were made. I know he made some.

Q. The agent himself made some deliveries?

A. With our truck.

Q. Well, now, how were you paid for this pickup and delivery service during the week following your discontinuance as agent?

They paid us 7% until his truck arrived.
And that was paid to you, was it not?
Yes, sir.
And no part of it was paid to Mr. Mulholland.
That's right.
Those four-wheel trucks were used only at the rail-
tation, were they not?
Yes, sir.
Now, Mr. Burns, you also testified last August that
id in your various businesses some 18 employees.
s that true?
A. Yes, sir.
Q. How many employees have you today?
Thirty-four.
Are these employees members of any union?
Yes, sir.
Were they members of any union prior to Novem-
1924?
Crawford: Mr. Examiner, I'm going to object to
estion. I can't see the materiality of whether they
mbers of a union or not.
niner Funk: What is the purpose of your ques-
Ir. Long?
Long: Well, to show that even Mulholland was a
r of a union different from any railroad union.
niner Funk: What are you trying to develop?
Long: To show that he was not an employee with-
railroad industry. He is Mr. Burns' employee, ad-
ly. He is a member of a union other than any rail-
nion or express union.
niner Funk: I believe he can testify to that.
Will you answer the last question, please Mr. Burns?
We had no union in 1924.
In 1924?
Yes. That's what you asked.

Q. Yes, I did. I'm sorry. Now, immediately prior to November 1, 1948, were your employees members of any union?

A. Yes, sir.

Q. And for how long a period prior to November 1, 1948, were they members of any union?

A. The union was set up on August 18, 1947.

Q. And what is the name of that union?

A. The United Construction Workers, affiliated with the United Mine Workers.

Q. Was Mr. Mulholland a member of that union?

1947 A. Yes, sir.

Q. And is he still now a member of that union?

A. Yes, sir.

Q. And he was a member of that union prior to November 1, 1948?

A. Prior to 1948.

Mr. Long: I have no further questions.

Mr. Crawford: Mr. Examiner, I am going to make another motion to strike the testimony with regard to the union. I don't believe Mr. Burns or any other employer is qualified to state whether or not the man is a member of a union. The Railway Express Agency can't tell you how many are members of the union and how many are not.

Q. I might ask Mr. Burns. Mr. Burns, have you negotiated any contract with this union of which you spoke?

Mr. Crawford: Well, now, Mr. Examiner—

Mr. Long: This is cross-examination, Mr. Crawford.

Mr. Crawford: To ask him if a certain man is a member of any organization doesn't make any difference.

Examiner Funk: Mr. Burns, do you know of your own knowledge that each and every one of these employees was a member of a union concerning which you have testified?

ss: No, sir.

organ: I want to add to Mr. Crawford's appro-
bjections as to the relevancy of the testimony. I
ppreciate the relevancy of the testimony, and I
that the testimony should be stricken. It has no
y to these proceedings, from our point of view.

ner Funk: Mr. Long, have you anything to say
question?

ong: Yes, I have. We all know that employees
dustry, the railroad industry, are members of vari-
nation-wide and well-known unions, generally,
are represented by such unions. Now, if we can
w that any of the individuals who performed ex-
rk at Sparta, Illinois during the period involved
members of such railroad unions and were mem-
ome union which is recognized as not a part of
try, I think that is material to the issue of whether
holland and the other individuals who performed
work at that point were or were not employees of
ns or were or were not employees of Railway
Agency.

rawford: Now, in answer to that, Mr. Long, if
still fail to see the importance, or any connec-
ause that is not determinative of whether a man
ployee or not. We might have a man on the plat-
re who is not a member of the Brotherhood of
Clerks. He may be a member of the Trainmen
nen or a member of some other organization.
no closed shop on the express company, and there-
akes no difference whether a man is union or non-
That is not the test, and there is nothing in the
n of employer or employee in the Retirement Act
es upon his membership in the union.

ong: It is not determinative, I concede that, but
ear upon the issue, as I see it.

Mr. Crawford: With all respect to Mr. Long, I can't see where it does. I can see where a man might very well be an employee under the Act and still be a member of the Mine Workers or the Trainmen or Switchmen.

Mr. Morgan: Mr. Examiner, may you not also fully appreciate, as Mr. Long says, the well-known national and international unions— Might I not engage in the realm of asking you to draw upon your knowledge of the controversies between the AFL and the CIO and District 50 of the Mine Workers, where that has been a general subject of conversation in organized labor circles for a good many years, and when we get into that field we get into a field of controversy that may be likened to water deeper than
any of us can wade. Mr. Crawford properly points
1949 out the Railway Labor Act doesn't permit a closed
shop, for one example, and many others that we may cite if it was proper to argue that kind of testimony or cross-examination. The whole thing is irrelevant and should be stricken, and we so move.

Examiner Funk: The Examiner must confess that he sees little relevancy to this question.

Mr. Long: Well, I'd like to ask Mr. Burns a few more questions for the purpose of the record anyway, Mr. Examiner.

Mr. Morgan: Then are we to understand, Mr. Examiner, that the testimony with respect to labor unions is to be stricken?

Examiner Funk: The testimony is not removed from the record, but the record shows that the Examiner sees little relevancy. Is that satisfactory?

Mr. Crawford: Personally, I'd much prefer to have it stricken from the record. I suppose it has the same effect. I don't know the procedure of the Board—how closely they follow the Examiner's comments that there is no relevancy to that.

Mr. Long: Well, I urge that it is relevant and therefore I insist that it be kept in the record.

Mr. Crawford: Well, we will abide by the Examiner's ruling.

Mr. Morgan: Mr. Examiner, you can appreciate, if we were disposed to go along with your observation, counsel feels that it should remain, he undoubtedly wants that to carry with it that some importance may or may not be attached to that testimony, and we reassert our move that the testimony in question with respect to membership or nonmembership in a labor union be stricken.

Mr. Long: Here is another point, too, Mr. Examiner. I propose to show through the testimony of Mr. Burns that he has made a bargaining agreement with one union covering all the employees in all of his businesses there, including the work performed for Railway Express Agency.

1950 Examiner Funk: What relation does that have—

Mr. Long: That clearly indicates, as I see it, that there is no separation of express work from any other work performed at that particular point—that he deals with all of the individuals as his employees and not employees of Railway Express Agency.

Mr. Morgan: When we reach that bridge, Mr. Examiner, we will undertake to cross it, but we are talking now on what has already gone on. What Mr. Long has in mind doing later on in these proceedings is something over which we have no control and we will answer that when we get to it.

Mr. Long: Well, then, I respectfully suggest that the Examiner withhold his ruling on the objection until we have completed our cross-examination of Mr. Burns.

Examiner Funk: I will withhold my ruling until you have completed your cross-examination.

Q. Now, Mr. Burns, I understand that you have entered into contract with the union representing your employees at Sparta. Is that true?

A. That's the working employees, not the office employees.

Q. I see. Now, is Mr. Mulholland included in the working employees?

A. He is.

Q. So the agreement that you entered into with this union covers the work performed by Mr. Mulholland. Is that true?

A. That's right.

Q. And did that agreement cover the work performed by Mr. Mulholland prior to November 11, 1948?

A. Yes, sir.

Mr. Long: I have no further questions.

Mr. Morgan: Mr. Burns, you answered that prior to November 11th that agreement you entered into with your employees there at Sparta covered the work that Mr. Molholland was doing previously. That included handling
pickup and delivery of express traffic, as your em-
1951 ployee, for the Railway Express Agency. Do you
feel qualified to determine the scope and operation of the agreement before and after, in respect to that work?

Mr. Long: I object to the question. It is argumentative, it calls for the workings of a man's mind, not for a fact at all. He is not an expert.

Mr. Morgan: Well, Mr. Examiner, it is clear to me, and that likewise goes to the counsel that proposed the question in the first place—can't you see that now it develops very clearly that Mr. Long is calling upon this witness to decide the scope and operations of labor union contracts, which is clearly beyond the scope of this case.

Examiner Funk: It seems to me, Mr. Morgan, that something of a similar nature came up last March, when I believe Mr. Hall was on the witness stand and you were cross-examining him with regard to the agreement in effect between the Clerks and the Railway Express Agency.

Mr. Morgan: That is correct, but I asked him in conection with whether or not employees paid on a commission asis had prior to August 1, 1937 been covered by a labor nion contract. That was not deciding a class of work perormed. It was how employees were paid. Mr. Examiner, f course it is within your discretion to pass judgment on hat, but for the life of me, being around the conference able in this and other matters for a good many years, I ail to appreciate any relevancy—why it is that any officer, ounsel or otherwise, of Express Agency has any right to uestion the witness in respect to the membership or nonembership in a labor organization. The Railway Labor ct specifically prohibits that.

Examiner Funk: Your motion again, Mr. Crawford, xactly.

Mr. Crawford: My motion is to strike from the record ll testimony or cross-examination propounded by Mr. ong to Mr. Burns relating to the question of membership r non-membership in a labor organization by the employees at Sparta, Illinois.

952 Examiner Funk: Having listened to the testimony given by Mr. Burns in response to questions proounded to him by Mr. Long and Mr. Morgan and Mr. rawford, the Examiner is unable to see the particular elevancy in this testimony, and the motion by Mr. Crawrd on the record to strike is granted.

Mr. Long: And counsel for the Express Agency would ke to have noted on the record an exception to the ruling.— have no further questions.

Examiner Funk: Mr. Hassenauer?

y Mr. Hassenauer:

Q. Mr. Burns, you were asked briefly to testify as to our being checked out by the route agent Howell when our resignation became effective. I'd like to have you tell the Examiner somewhat in detail just what this process of checking out consisted of.

A. It consisted of checking the money and accounts, the receipts which we had collected due the Express Company, checking the equipment and stationery to the other agent. The equipment consisted of a safe and desk and revolver.

Mr. Long: Was the four-wheel truck also included?

Witness: Yes, sir.

Q. Were the four-wheel trucks on your property?

A. They were on the railroad property.

Q. For what period of time did this checking out process go?—Since you filed your last report with the Express Agency as to receipts, or did it go beyond that date when you filed your last report?

A. No, it was the day we checked out. We made a report on November 30th, and another report on December 15th, when we were checked out—reports made to the Express Company.

Q. Then who took care of taking the materials which you had on hand in your place of business over to the railroad station at Sparta?

1953 A. Our trucks and the agent together—our boys and the agent together.

Q. Agent Hurtig?

A. Yes, sir.

Q. Is Hurtig employed by the GM&O Railroad at that point?

A. No, sir. My understanding is that he is an exclusive Railway Express agent.

Q. He is not an employee of the railroad company.

A. No, sir.

Q. But he operates out of the railroad station.

A. That's right.

Q. Your letter of resignation to the Railway Express gency recited that you wished to resign as of November 1948.

A. Yes, sir.

Q. At the time you testified before the Examiner in is case in August 1948, did you contemplate at that time signing?

A. Yes, sir.

Q. Did you receive a copy of the equipment that was iecked out with you by the route agent Howell?

A. There was a copy made, yes, sir, and we have a copy.

Mr. Hassenauer: That's all, Mr. Burns.

Redirect Examination by Mr. Morgan.

Q. Mr. Burns, if you know, tell us how long the Interate Commerce Commission requires you, or the Express gency, to keep records of accounts.

Mr. Long: I object to that. The law and regulations beak for themselves, Mr. Morgan. I can furnish you that formation if you would like it.

Mr. Morgan: Very well. Mr. Examiner, here's my oint. Mr. Hassenauer has asked Mr. Burns what period of time did the check cover. I'll ask Mr. Burns this 954 question.

Q. Did this check cover the turning over of your ecord of accounts and transaction which had ensued—ver what period of time did that cover, if you recall?

A. Well, most all copies of records now are sent to the ccounting department. At one time we kept copies of erything. Very few copies are kept, outside of balance ieets, in our office now.

Q. I can see Mr. Long's proper objection that where e Express Agency itself would have to keep those recds for a long period of time, perhaps it wouldn't be ecessary for the local agent. But what records did you rn over on that score, as to transactions?

A. We turned over all balance sheets that was on hand in the office that were not destroyed, all records that were not destroyed. Now, as I said, there are very few records kept in the local office now. They are sent to the accounting department.

Q. Now, as to supplies. That means what? Waybills and other forms? Give us an example.

A. That would mean forms for making the reports to the accounting department, waybills for billing out shipments that were prepaid and collect.

Q. Those were Express Agency forms which you had on hand and which had been supplied to you. They were turned over to the new agent. Is that correct?

A. Yes, sir.

Mr. Morgan: No further questions.

Mr. Crawford: I have one question here. I assume this was answered in Mr. Burns' testimony at the previous hearing, but I thought as long as he is here I'd ask him this.—Mr. Burns, with reference to the exhibits that you have introduced in evidence here, relative to instructions received from the route agent and other officials of the Express Company, directing you to turn over or transfer certain property during the time that you were agent there at Sparta, did you or did you not, over a
1955 period of time, receive in a general way—I'm not going to refer to any specific example like the baby chicks, etc.—but did you in a general way receive instructions from the route agent or officials of the Express Company with reference to the method or manner of handling express?

Mr. Long: I object to that. It is a shotgun question. It is too broad, too general, calls for a conclusion of law.

Examiner Funk: Break your question down a little bit, if you can.

Mr. Crawford: Well, Mr. Examiner, I must confess I t know if I can reduce it down. It seems to me the ess knows whether or not he has received from time me instructions. I'm not asking him to give a con- on as to whether that was supervision or not. I'm asking him if he received instructions from time to from the Express Company with reference to the nei in which he handled express shipments, in a ral way.

xaminer Funk: What Mr. Long is referring to is any 'er as to methods or manner, that being very close to statutory definition.

Examiner Funk:

Mr. Burns, did you from time to time receive in- ctions from the Railway Express Agency regarding work?

Yes, sir.

r. Long: I object to the question and move to strike answer. It is a conclusion of the witness. I'd like to v what those so-called instructions are. If they were riting, I'd like to see the written copy.

Do you have any written copies of any instructions ished to you by the Express Agency other than those h have been introduced here in evidence?

Well, we had our general rules and instructions to follow.

Q. Did you receive any circulars from the Express Agency directing you to do this or that?

r. Long: I have no objection to that at all—circulars. t is another thing. But when you use the word "in- ctions," that, as I see it, calls for a conclusion of law.

xaminer Funk: You may be correct in that.

Did you receive any other circulars?

r. Long: Mr. Examiner, I'd like to have a ruling on last motion to strike.

Examiner Funk: Insofar as the question used the word "instructions," we will grant the move to strike it.

* * * * *

A. I have a general circular on equipment and personal property, written December 4, 1922, Circular No. 312, copies to route agents: (Exhibit XLV read).

1957 (EXHIBIT XLV was received in evidence.)

Mr. Morgan: Mr. Burns, have you received instructions from your superior at Express Agency as to how to ship firearms, money, or jewelry, as the case may be?

Mr. Long: Same objection.

Examiner Funk: You are again objecting to the use of the word "instructions," Mr. Long?

Mr. Long: Yes, I am.

Examiner Funk: The motion is granted.

* * * * *

1958 By Examiner Funk:

Q. Did you have any other particular equipment there besides the flat top desk and the platform trucks, concerning which you have testified?

A. We had other equipment—

Q. Furnished by Railway Express Agency.

A. Yes, sir, we had other equipment.

Q. You may have covered this before, but can you tell me briefly what that equipment was?

A. It consisted of two stationery cases, one revolver, flat top desk, two four-wheel trucks, a safe, one revolving chair. We originally had a copy press, which was destroyed.

Q. What equipment did you have on hand at the time you were checked out, Mr. Burns?

A. We had two stationery cases, a flat top desk, a safe, revolver, chair, and this desk.

Do you have any further testimony that you wish ve?

No, sir.

Ir. Hassenauer:

Mr. Burns, you filled out Form 7050 monthly, did not, when you deducted your express commissions and ered an accounting to the Express Agency?

Yes, sir.

Q. In that form, did you set forth, or in 7051, the payment of any express commissions to any of your employees?

No, sir.

So that the form reported to Express Agency would ate that all of the express commissions received by were retained by you.

Yes, sir.

And you made the requisite deductions for the re-ient tax.

Yes, sir.

Can you tell the Examiner what process was applied ie route agent at the time that you were released on ond that was executed by you at the time you took our express work?—Did you get a letter releasing you iat bond which was executed by you?—You did exe-a bond, did you not?

No, sir.—In my memory it seems to me I did at the ning, but it's been so long ago, nothing came up about ond since my entering the employ when I made appli-n for bond. I've never heard anything of it since.

You did make an application for bond, but you were laced under bond by the Express Agency?

Well, it was my thought in the beginning that I but I've had no correspondence about it.

You do not recall ever having signed a bond pre-l to you by Express Agency?

A. Just an application.

Q. Just an application. But were you ever notified by the Express Agency that you were ever actually under bond?

A. Not to my knowledge, no.

Q. At the time you were checked out by the route agent, did he give you any statement you were being released on the bond—the bond was being canceled?

A. No, sir.

Mr. Hassenauer: That's all.

1960 Mr. Long: I have just a few more questions.

Examiner Funk: Certainly, Mr. Long.

By Mr. Long:

Q. What salary did you pay Mr. Mulholland prior to November 1, 1948?

A. $1.10 per hour, for 40 hours, time and a half after 40 hours.

Q. Did you allocate any part of that to his express work?

A. No, sir.

Q. Did you pay Social Security taxes on that salary?

A. Yes, sir.

Q. That is, Social Security taxes as distinguished from Railroad Retirement taxes.

A. Yes, sir.

Q. And to whom were they paid?

A. To the Collector of Internal Revenue. The Social Security Board, of course—that would be the Department of Internal Revenue.

Q. Did you send them to Springfield, Illinois?

A. Yes, sir.

Q. Now, in making out these 7050 forms, did you make any deductions whatever from your gross commissions for any expenses?

No.—Our commissions was on the express handled
for delivery service.

And you made no deductions whatever for any ex-
es, did you?

No, sir.

So that you reported on your 7050—

The answer is different on that. Deductions were
made. Those were billed and the checks were sent
t.

aminer Funk: Did the Express Agency pay you any
for the use of your premises?

itness: Yes.

aminer Funk: Separate from your other compensation?

Witness: Yes, sir.

Q. These premises were owned by you, were they

Yes, sir.

And that was in the nature of an allowance for the
of those premises?

Yes, sir.

aminer Funk: How much rent?

itness: Ten dollars a month.

r. Long: I have no further questions.

aminer Funk: If there are no further questions, we
excuse Mr. Burns.

* * * * *

Mr. Long: Because the definitions of these groups
or classifications, sometimes referred to in the record
as catagories, a set forth in the Record of the hearing
held between and including March 14 and 16, 1949
appear in need of clarification and amplification,
way Express Agency, Incorporated submits the defi-
ns set forth below. For brevity Railway Express
ncy, Incorporated is referred to as "Express Agency"

and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees is referred to as "The Clerks." The references in parentheses are to the pages in the Record of the hearing of March 14-16, 1949 where the former definitions or statements relating thereto appear.

* * * * *

1971 6. Individuals, corporations or partnerships who,
in conjunction with or in addition to some other activ-
ity entirely outside of the railroad industry, act as Express
Agent and have their Express office on premises which they
control by reason of ownership or lease or rights superior
to that of the Express Agency. Any one of these agents is
permitted to have a part or all of the work performed
by any of his designees. These agents are paid generally
on a commission basis; however, a few are paid a fixed
allowance or stipulated sum per month, and a few a com-
mission plus a fixed allowance per month. These have
1972 been designated as merchant agents and may be
subdivided as follows:

(a) A merchant or small business man who conducts an independent business and at the same time carries on the express work in his regular place of business such as a grocery store, hardware store, garage, etc. These may be further subdivided as follows:

A. Those who have no connection whatever with any railroad.

B. Those who act as caretaker of a station for a railroad, or have some other incidental connection in the railroad industry.

(b) A doctor, priest, minister, public official, who at the institution where he is employed or engaged in some other activity represents the Express Agency as agent.

(c) A housewife who conducts her Express Agency in her home.

An employee of a business not within the railroad
y who with the consent of his employer has the
s office in his employer's place of business. (R. 325
.)
this classification are not employees.

* * * *

11. Individuals employed by the merchant agent to
sist him or to perform entirely the Express work he
gages to perform pursuant to his agreement with
xpress Agency. (Formerly 12 as shown on page
7 of Record.) These are not employees.

TEPHEN P. VICTOR was recalled for examina-
nd testified as follows.

Direct Examination by Mr. Long.

* * * *

Q. Mr. Victor, have you had any correspondence
th the Puget Sound Navigation Company concern-
agency at Port Townsend, Washington?
es, sir.
o you have the correspondence with you?
es.
Vill you examine that correspondence and produce
addressed to your attention November 22, 1946?
es. (Handing letter to Mr. Long.)
show you letter marked Exhibit LI for identifica-
d ask you if that is the original of the letter of
er 22, 1946, addressed to your attention by Puget
Navigation Company.
t is.
ong: May Exhibit LI be accepted in evidence?
iner Funk: It may.
HIBIT NO. LI was received in evidence.)

(Remarks off the record.)

Mr. Crawford: What we object to is the conclusion on the part of Mr. Strassburger.

1980 Mr. Long· The Railway Express Agency, Inc. offers in evidence Exhibit LI for the purpose of showing the position of the employer of R. R. U'Ren, who was named as the merchant agent for Railway Express Agency, Inc. in its various exhibits—what are they, Mr. Victor?

Witness: Exhibits 31-A(1), 31-B(1) and 31-C(1).

Q. Mr. Victor, do you know whether the contract between Railway Express Agency, Inc. for the operation of the merchant agency at Port Townsend, Washington was entered into between Railway Express Agency, Inc. and Mr. R. R. U'Ren, or between Railway Express Agency, Inc. and Puget Sound Navigation Company?

A. The records in my office indicate that the contract was entered into between the Railway Express Agency, Inc. and the Puget Sound Navigation Company, located at Colman Ferry Terminal, Seattle, Washington.

Q. And the correspondence concerning which you have just testified as between Puget Sound Navigation Company and yourself as auditor of disbursements for Railway Express Agency arose by reason of this contract that is between Railway Express Agency, Inc. and Puget Sound Navigation Company?

A. That is right.

Examiner Funk: Mr. Long, do you have a copy of the contract in question?

Q. Mr. Victor, was that contract oral or in writing?

A. It was oral.

Q. And were the terms of that contract similar to the terms of the contracts which have been entered into generally by Railway Express Agency, Inc. and its merchant agents?

es.
ner Funk: Do you know that of your own knowl-

ss: No—only from information that has come to
.
our knowledge is based upon information in your
ords in your office.
\. Yes. That's right.
Examiner Funk: Mr. Victor, do the records in
ice show the content of these so-called oral con-

ss: No.
hey do, do they not, Mr. Victor, insofar as the
ions paid?
h, that is so, yes. That is correct.
lorgan: Mr. Examiner, I want to interpose an
1 if I understand the testimony, questions and
given, correctly. First of all, the question was
f the witness if he had a copy of the contract
into in respect to this merchant agent, the Puget
'ompany at Seattle, and he said he didn't; it was
question was asked of the witness if that oral
was in the same form and of the same propor-
extent of its force and effect with written con-
vith so-called merchant agents of the company
out the system; and the witness testified that it
ow, that is purely hearsay, and it seems to me
y of that kind should not be received in evidence
t is absurd, from my point of view, to try to say
oral understanding, an oral conversation, is the
form and substance as a written contract that
e set down and applicable at some other merchant
Factually speaking, Mr. Examiner, the witness
know anything about that. It is fair to say he
have the least indication what that oral under-

standing is, other than general knowledge as an official of Railway Express Agency.

Examiner Funk: Do you agree with that statement, Mr. Victor?

Mr. Morgan: That is so apparent that I think it may not be disputed.

Mr. Long: May I ask Mr. Victor a few questions so we can add a little light to the picture, Mr. Morgan?

Mr. Morgan: No, Mr. Examiner, not for the moment, because I don't want to have Mr. Long have the op-
1982 portunity—of course, I'm not going to tie his hands
in any way, but it doesn't seem at all right or proper that he should now be given the opportunity to retrieve an apparent irregularity in his questions and answers of this witness.

Examiner Funk: Well, Mr. Morgan, it is true that the statements made up to this time by Mr. Victor do not indicate that he knows of his own knowledge the exact terms of any contract, written or oral, and the record must show that the terms of any such purported contract have not been established.

Q. Mr. Victor, insofar as your records show, is the merchant agency at Port Townsend, Washington handled similarly to the merchant agencies elsewhere?

Mr. Morgan: I object to that, Mr. Examiner, for the same basis of reasoning. The witness testified what the understanding was, if any existed—that it was oral, and he was unfamiliar with it.

Examiner Funk: Unless the records of Railway Express Agency which are in Mr. Victor's charge show the actual terms of any purported contracts between the so-called merchant agents and Express Agency, then he has not been qualified as a witness to testify regarding the same.

Q. Do you know the basis for the payment of the merchant agency at Port Townsend, Washington, Mr. Victor, from your records?

A. I do.

Q. What is that basis?

A. The service performed under a verbal agreement, according to my records, was to conduct the express business and act as a representative for Railway Express Agency, and receiving therefor an amount equal to 10% of the revenue on business covered by Railway Express billing. 5% of revenue on interline billing, 5% of revenue on air express billing, and 33⅓% of the fees on financial papers sold.

By Examiner Funk:

Q. Is that all your records show, Mr. Victor?

1983 A. That is all they show.

Q. You would have no knowledge of your own with regard to any other terms of any agreements?

A. No.

Mr. Morgan: Mr. Examiner, he testified that, according to the verbal understanding, thus and so was paid. He may testify as to the amounts paid, is my point, but as to saying that thus and so, certain amounts were paid, in pursuance of a verbal understanding—we do not accept that testimony as appropriate or proper that Mr. Victor may give. In other words, I have the same objection in regard to his saying certain amounts were paid in pursuance of a verbal understanding. He has no right to testify in regard to certain things being done in pursuance of a verbal understanding.

Q. Mr. Victor, is it not fair to say you were not present at the time this so-called verbal arrangement was made?

A. That is right. I was not present, but I have in my records a signed statement by the superintendent of the Railway Express Agency at Seattle indicating that he made such a verbal agreement, and such statement was signed by him on December 29, 1941.

Mr. Long: Your office has charge of information relative to the payments and basis for payment of all merchant agents, has it not, in your particular territory?

Witness: No, Mr. Long. The district accountants would have it, as a general proposition.

Mr. Morgan: Now, Mr. Examiner, apparently Mr. Long is trying to make a point of something. I have yet to be able to understand what point he is trying to make. First, I am objecting, as vigorously as I may, to Mr. Victor testifying that certain things were done in pursuance of an understanding. As the Examiner properly observed, Mr. Victor hasn't been properly qualified, because he wasn't present. Now he says the basis for his observations
1984 is in pursuance to some letter written sometime from
some superintendent of the company, where he is alleged to have said that certain things were done in pursuance of an understanding. Now, my objections are just as vigorous to Mr. Victor giving testimony that he has a letter in his possession from somebody saying it is in pursuance of something. I object to that. It is just as fallacious as is his own direct testimony, because that letter has never been produced. If it were to be produced—and I am not solicitous of helping Mr. Long out one least bit—if it were to be produced, I might have the same objections to the letter that I am having to the testimony given direct by Mr. Victor. A record shouldn't be built up here, Mr. Examiner, that carries with it absolutely no weight, from my point of view.

Examiner Funk: The record must show that, as previously stated by the Examiner. Mr. Long has not qualified Mr. Victor for the purpose of testifying in regard to the so-called oral agreement. If Mr. Long desires to submit a certified copy of the letter in question, the Examiner will mit it into evidence for identification purposes for whatev weight or value it may have. It would have to be ceried.

(Remarks off the record.)

Mr. Morgan: I accept your observation, Mr. Examiner, conformity with the thought we had as to the value of is testimony. Now, I wanted to add—I heard Mr. Vicr mention Mr. Fitzgerald, the superintendent. Mr. Fitzrald has subsequently deceased—the superintendent alged to have written this letter.

Examiner Funk: Could that not be corrected, Mr. Moro, by having a certification of some official of Express ency that that was his signature?

Mr. Morgan: I would say so, but I simply wanted to ke that observation, that Mr. Fitzgerald has subsequently eased.

Mr. Long:

Q. Mr. Victor, I show you Exhibit LII, and ask you to describe the same.

5 A. This is an affidavit signed by Alex M. Peabody. He is the president and chief executive officer of the get Sound Navigation Company.

Q. Was that affidavit sent to you in the course of your respondence with the Puget Sound Navigation Comy?

A. Yes.

Ir. Long: May Exhibit LII be accepted in evidence?

Examiner Funk: It may be so accepted.

EXHIBIT NO. LII was received in evidence.)

• • • • •

3 Mr. Crawford: It has been suggested, and we so offer in evidence, the questionnaire submitted to Wil- C. Pearson, Ocean Park, Washington, by the Rail- Express Agency, consisting of 21 sheets attached, and

it is being introduced for the purpose of affording the Examiner the entire information contained in there and not with any understanding that we are bound by the exhibit.

Examiner Funk: Is this the same questionnaire from which Mr. Long had Mr. Victor read certain questions and answers, and regarding which Mr. Morgan also read into the record certain questions and answers?

Mr. Crawford: That is correct.

Examiner Funk: The Examiner will receive this document into evidence for whatever value it may have.

(The questionnaire of William C. Pearson, above described, was received in evidence and marked EXHIBIT LX.)

• • • • •

2004 By Mr. Long:

Q. Mr. Victor, have you read the testimony that you gave at the hearing held between and including March 14 and March 16, 1949?

A. Yes.

Q. Is there anything in that testimony that you would like to clarify?

A. Yes.

Q. Will you please proceed.

A. Beginning on page 403 of the record of that hearing, the Examiner asked me whether we had included in 2005 our Exhibits, XXXI-A, B and C and XXXI-A(1), B(1) and C(1), the agencies where the express agent also performed some railroad work. In the answer to that question, I stated that they are not included. These agencies are not included. However, in order that there may be no misunderstanding, I wish to state that there are included in those exhibits some express agencies which are operated in the business premises of the agents, such as grocery stores, etc., where the agent also acts as a caretaker or custodian for a railroad or has some other railroad con-

ion on railroad premises. In those cases the ex-
ss work is performed on business premises and in con-
ion with a business having no relation whatever to the
road industry. The express agencies which were ex-
led from those exhibits are those which are operated
ailroad premises, usually by a caretaker or custodian
it who is also a merchant.

s an example of category 6(a) B of the groups referred
n these proceedings as having performed, personally
hrough an assistant, work in Railway Express Agency,
ould like to refer to Mr. J. A. Dehoff, who represents
Western Maryland Railway as agent at Greenmount,
yland, and at the same time is agent, at least in name,
Railway Express Agency, Incorporated, at Greenmount,
yland, where he operates a store, together with a part-
by the name of Mason M. Rate, under the name of De-
& Rate. The express business is conducted in the gen-
country store operated by these two partners. Ex-
s service at this place was by over-the-road truck only.
further example of 6(a) B is Martin, Florida, where
Express Agency is represented by merchant agent E.
'urnipseed, at least in name. Mr. Turnipseed is agent
he Atlantic Coast Line at Kendrick, Florida. The ex-
s agency is conducted in Mr. Turnipseed's grocery
, in Martin, Florida, where the grocery store and the
ess agency are conducted by the agent's father. The
ess service at this place was by over-the-road truck

. Long: That's all.

By Examiner Funk:

Mr. Victor, you state that Mr. Dehoff is agent for
ern Maryland Railway Company at Greenmount,
land?

Yes.

Q. Do you know, of your own knowledge, what duties he performs for the railway company?

A. I do not.

Q. Do your records show whether or not there is a railroad station at Greenmount?

A. They do not.

Q. You say that it is served by an over-the-road trucker. Is it possible, since Mr. Dehoff is agent for the railroad company at that point, that any of that express comes through his hands as agent for the railway company?

A. Since the express is conducted by over-the-road truck service, no such express would ordinarily be received over the railroad.

Mr. Long: Would any express be transported over the railroad from Greenmount?

Witness: No.

Q. With regard to Mr. Turnipseed, to whom you have referred as your express agent at Martin, Florida, I believe you also stated that Mr. Turnipseed is agent for the Atlantic Coast Line Railroad Company at Kendrick, Florida. Do your records, Mr. Victor, indicate whether Mr. Turnipseed is a full-time railroad agent?

A. They might indicate that through the information we require on form 7050.

Q. Do your records indicate whether or not Mr. Turnipseed could be properly designated as an agent-operator for the railroad company at that point?

A. They wouldn't so indicate.

2007 By Mr. Morgan:

Q. Your records also wouldn't indicate that perhaps, if there are no passenger trains operating in and out of this town, the express might not move in package freight cars tri-weekly or every other day, either, would they, Mr. Victor, the fact that the town is also served by over-the-

truck would not necessarily mean that no express
c might not be moving over the railroad either, would

That would be an indication that there is no express
c handled in and out of that town in other than over-
oad truck.

Would you say that that was conclusive proof?

Yes.

Ir. Crawford:

Mr. Victor, with reference to Mr. Robert R. U'Ren
rt Townsend, Washington, without any regard to any
contract or any of these contracts, do your 4 records
whether or not Mr. U'Ren is paid at the rate of 6½%
ission for his handling of delivery and pick-up serv-
nd if so, is he paid that commission direct?

My record is not clear that pick-up and delivery
ce is performed by Mr. U'Ren. We could look into
however.

Will you do that, for the benefit of the information
e Board.

We will.

• • • • •

MR. HARRY KEARBY, a witness produced by The
Order of Railroad Telegraphers, having been first
duly sworn, was examined and testified as follows.

Direct Examination by Mr. Hassenauer.

State your name, please.

Harry Kearby, Vice-President for The Order of
oad Telegraphers.

Q. How long have you occupied that position?

A. About eleven years.

Q. You have previously attended the hearings be-
Examiner Funk in this case, have you not?

A. I have.

Q. You are familiar with the proceedings before the Railroad Retirement Board in this matter?

A. I am.

Q. On behalf of The Order of Railroad Telegraphers, do you wish now to make a statement on the record as to the position of the organization with regard to the various groups and classes of persons handling express?

A. I do.

Q. Will you proceed?

A. Joint railway-express agents constitute that large group of employees located at railroad stations on the various railroad lines throughout the United States represented by The Order of Railroad Telegraphers, to whom express commissions or other compensation is paid by Railway Express Agency, Incorporated. This definition is the same as is applied in the scope rule, Article 1, of the Agreement, for example, between Railway Express Agency, Incorporated and The Order of Railroad Telegraphers on the Atlantic Coast Line Railroad, effective August 1, 1945. It is the same as applied in the scope rule of the Agreement between the same contracting parties on the Southern Railway Company, Georgia Southern and Florida Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Alabama Great Southern Railway Company, New Orleans and Northeastern Railroad Company, Carolina and Northwestern Railway Company, Danville and Western Railway Company, Yadkin Railroad, High Point, Randleman, Asheboro and Southern Railroad, Atlantic and Yadkin Railway Company, effective August 1, 1946; Charleston & Western Carolina Railway Company, effective January 1, 1947; Tennessee Central Railway Company, effective January 1, 1948; Central of Georgia Railway Company, effective March 1, 1948; Seabord Air Line

Railway Company, Macon, Dublin & Savannah Rail-
road Company, effective May 1, 1948; Atlanta & Saint
Andrews Bay Railway Company, effective November
47; and Georgia & Florida Railroad, effective July 15,

ese joint employees, also known as and referred to in
ecord as joint agents, have acquired and maintained
respective positions with the various railroads
ghout the United States as a result of provisions of
ollective bargaining agreement between The Order of
oad Telegraphers, representing such joint employees,
he various railroads, subject to the Railway Labor
s amended, the Railroad Retirement Act, the Carrier's
ng Act, the Unemployment Insurance Act, and related

ch employee under the provisions of the respective
ining agreement is given a seniority rating in the rail
er's records and his position is so shown on a seniority
r published and promulgated periodically by the car-
mployer. Where a new position covered by the col-
e bargaining agreement is created, or a fixed position
uired to be refilled, the posting of such positions by
ail carrier is required by the collective bargaining
ments. The rail carrier thereupon bulletins such posi-
y posting in the particular seniority district or di-
a request for bids by all applicable employees for
osition. Invariably, such request for bid or bulletin
t forth the station location, the rail carrier's rate of
ours of assignment and weekly rest day, and if ex-
is handled at such position, the monthly average ex-
commission is set forth or sufficient information to the
-applicant that express commissions are paid. Sen-
established by such collective bargaining agreement
es effective only when vacancies occur, new positions
eated, or positions are abolished.

Express commissions, transfer allowances, and pickup and delivery allowances as in force on the effective date of the several agreements are the basic commissions and
allowances, and will not be changed except by nego-
2016 tiation between the parties to the agreement. Where
handling of express is discontinued at a station, the agreement between The Order of Railroad Telegraphers and the contracting rail carrier usually provides for establishing the rate of compensation, or salary shall be made conforming to rates paid for similar positions where express is not handled. The converse is equally true and applied. Where express commissions are created at any station or office, thereby increasing the average monthly compensation paid to any position, prompt adjustment of the salary affected shall be made conforming to rates paid for similar positions where express is handled.

Caretakers and Custodians.—The terms "caretakers" and "custodians" have been used in this record, and for the purpose of assisting the Examiner, we believe that reported definitions of caretakers would be helpful in formulating a report and ruling in these proceedings.

The term "caretaker" has been defined by the Interstate Commerce Commission in accordance with an Order entered by the Commission on April 18, 1921, effective as of July 1, 1921, in prescribing "Rules governing the classification of steam-railway employees and reports of their service and compensation." These rules amend certain other rules previously in effect as a result of an Order entered June 17, 1915, and also an Order of July 13, 1917. The previous rules were annulled as of July 1, 1921. Under Grade 1 of the classification of janitor and cleaner groups, symbol LJ-1, description of classes listed as caretakers is as follows: "Janitor and cleaner, caretaker, cleaning, caring for and heating stations."

The position of custodian, which term has been used

rchangeably with that of caretaker in this proceeding,
lefined by the Interstate Commerce Commission in
above order as an individual in charge of a large ter-
al station or of a record room.
he term “caretaker” is a term which under the facts
ented in the record in this case shall apply to all those
individuals who have been retained by a rail carrier
to perform the service prescribed in the definition
contained in the proceedings of the Interstate Com-
e Commission as above outlined, and the term “custo-
” should be omitted as applying to the individual and
ices performed by him as a caretaker within the defini-
as prescribed by the Interstate Commerce Commission.
a further illustration of the duties and limitations
h have been placed upon the individual employed as
etaker by a rail carrier, the attention of the Examiner
lled to provisions contained in the agreements between
Order of Railroad Telegraphers and various Class I
oads throughout the United States. For example,
e agreement between the Lehigh Valley Railway Com-
and The Order of Railroad Telegraphers, covering
of pay and working conditions, effective February
48, Rule 31, Micellaneous Items, provides as follows:
At stations now or formerly listed in Telegraphers'
ments where agencies have been or may be abolished,
akers or other persons employed at such stations by
ompany will not be permitted or required to sell
s, check baggage, set forth or bill freight, nor take
pt for freight delivered, keep records, or do any such
d clerical work; nor will caretakers or other persons
yed at such stations by the company be required by
act as agent for the Railway Express Agency.”
s the position of The Order of Railroad Telegraphers
s proceeding that where a caretaker has been employed
rail carrier and also individually employed by the

Railway Express Agency to handle express on the property of the rail carrier, that such caretaker is for the purpose of this proceeding an employee of the Railway Express Agency, Incorporated. Where, however, the caretaker is employed by a rail carrier and is engaged in a private business establishment, either his own or employed by the owner of such establishment, and is engaged by the Railway Express Agency, Incorporated to handle ex-
2018 press at such establishment, such individual is not an employee of the Railway Express Agency, Incorporated. For example, in a community consisting of one or two establishments, a grain elevator and a railroad station, with the closing of the railroad station the operator of the grain elevator is frequently retained as the merchant agent to handle express, as in the case of W. F. Brown at Alta, Illinois, on the Chicago, Rock Island & Pacific Railroad, who was appointed caretaker of the railroad station by the rail carrier and was also employed by the Farmers Cooperative Elevator Company in connection with the operation of their grain elevators, and subsequently engaged by the Railway Express Agency, Incorporated to handle express in that community. In this instance, it is the position of The Order of Railroad Telegraphers that W. F. Brown is an independent contractor. This case is not an isolated case. There are a number of such cases existing throughout the United States.

Merchant Agents.—From the record in this case, individuals termed merchant agents are clearly distinguishable from joint railway-express agents. Unlike the joint railway-express agent, the merchant agent himself contracts with the Railway Express Agency for the operation of the express agency, whereas the joint agency represents the Express Agency by reason primarily of his railroad employment and representation by The Order of Railroad Telegraphers.

is no collective bargaining agreement entered into
the Railway Express Agency, Incorporated and
he merchant agents so engaged. The handling of
by the joint railway-express agent was contracted
the various railroads subscribing to the express
ns agreements in effect between The Order of Rail-
legraphers and the contracting rail carrier.

is no seniority rating given merchant agents by
way Express Agency, Incorporated, such as pro-
r by collective bargaining agreements between
ler of Railroad Telegraphers and the contracting
l carriers.

The income derived by merchant agents from their
pective business is not taken into consideration by
ress Agency in establishing the rate of commission
lowed the merchant agent for handling express,
the rate of pay of the joint railway-express agent
ted where the handling of express is discontinued
il station or where express business is created at
tion.

erchant agent is not subject to any control in the
ance of the handling of express business as is the
ilway-express agent. Where a joint railway-ex-
ent is not fully or properly performing the duties
ss agent at his station, a complaint is made by
way Express Agency, Incorporated to the rail car-
primary employer of the joint railway-express
which instance the rail carrier takes the neces-
ps to correct the situation that may exist at such

l any dispute exist between the joint railway-
agent or The Order of Railroad Telegraphers with
o the rate of commission paid at a particular rail
and such dispute fails adjustment in conference
the Railway Express Agency, Incorporated and

The Order of Railroad Telegraphers, such dispute may be referred to the National Railroad Adjustment Board as provided for in the provisions of the Railway Labor Act as amended, whereas any dispute existing between the merchant agent and the Railway Express Agency, Incorporated with respect to the rate of commission would be resolved by negotiation between the merchant agent himself and the route agent or other officials of the Railway Express Agency, Incorporated. Where such dispute fails adjustment, there is no administrative body to which the merchant agent may file his dispute for adjustment.

All agreements between the Railway Express Agency, Incorporated and The Order of Railroad Telegraphers are required to be filed with the National Mediation Board in accordance with the mandatory provisions of the Railway Labor Act as amended. Agreements between the
2020 Railway Express Agency, Incorporated and merchant agents are not required to be filed with any federal agency.

There is a control exercised over joint railway-express agents by Railway Express Agency, Incorporated. Such control as is exercised over the joint railway-express agency is not applied and forced or recognized by the merchant agent as the controlling factor in the handling of express.

The joint railway-express agent earns his livelihood in the railroad industry, whereas the merchant agent operates an independent business in conjunction with which he performs express work.

That concludes the statement, sir.

Mr. Hassenauer: I have no further questions.

Examiner Funk: Any questions, Mr. Crawford, or Mr. Morgan?

Cross-Examination by Mr. Crawford.

r. Kearby, when you got into the merchant agency
lost track of your position on merchant agents,
ey are not custodians but merchant agents.

ll repeat it: Merchant agents.—From the record
se, individuals termed merchant agents are clearly
shable from joint railway-express agents. Un-
joint railway-express agent, the merchant agent
contracts with the Railway Express Agency for
ation of the express agency, whereas the joint
epresents the Express Agency—

at is the part I wanted. In other words, it is your
that the merchant agents are independent con-

at is the position of our organization.

ell, now, let me ask you, as far as the Telegraphers
rned, the merchant agents have never been under
sdiction, have they?

. Not to my knowledge.

And you have never represented them in any
in collective bargaining, or in any way where
called upon to familiarize yourself with the de-
heir operation with Express Agency, have you?

on't think we have ever represented any of them.

w, upon what basis do you form your opinion
t merchant agents are independent contractors,
ated that your organization has never had any
n over the merchant agents, has never been in
n to familiarize themselves with the details of
ations with Express Agency?

ng: May it please the Examiner, that is a very
ative question. I hardly think it is a proper ques-
proceeding like this.

er Funk: The question is somewhat argumenta-
you rephrase your question, Mr. Crawford?

Mr. Crawford: Yes.

Q. Mr. Kearby, will you tell us the basis for your information that merchant agents are independent contractors, on which you have stated your conclusion in your testimony?

A. Well, as a representative of the Telegraphers, I have had occasion at different times to come in contact with a situation where a merchant agent was employed. I might cite a specific instance. When the strike was called on the T. P. & W. Railroad, there was a joint agent at Eureka, with the Santa Fe, and this point agent was being paid a commission. After the men returned to work, the express was not reinstated at the depot. At the time the strike was called, or at the time the T. P. & W. discontinued operations, they employed another party—you might call him a merchant agent—to handle the express, and he did so, and later the express company didn't restore the express business to the station, and I handled the case with the carrier and secured an adjustment in the rate of pay for the agent due to the express having been discontinued. Now, I was very familiar with that
2022 case, and in my work in general I have come in contact with questions of that sort.

Q. Have you discussed the method of relationship of the merchant agent with the Express Agency with any of the express officials?

A. I have not, myself; I think our organization possibly have.

Q. Have you ever discussed with the merchant agents their relationship as far as their being retained as merchant agents by the Express Agency?

A. I don't recall any specific case where I have, but at the same time we have information—our organization has information—relative to the duties and the work of a merchant agent.

Q. Are you familiar with the duties of a merchant agent?

A. Well, I assume that I am.

Q. Would you say, then, that the merchant agent's duties are the same now as they have always been, as far as their routine duties daily?

A. I don't know what they have always been.

Mr. Crawford: That was the only question I have.

Mr. Morgan: Well, I want to give my reaction, Mr. Examiner, not necessarily in the form of questions, to Mr. Kearby's testimony. In the previous hearings of the Board, counsel for the Express Agency, Mr. Long, set the interests of The Order of Railroad Telegraphers separate and apart on joint agents. I thought their interests on that score were fully satisfied, so far as The Order of Railroad Telegraphers were concerned. Now Mr. Kearby comes in and gives testimony as though we, instead of appearing before the Railroad Retirement Board, with you as our Examiner, were in reality being called upon to let The Order of Railroad Telegraphers pass judgment upon the Clerks' interests in this case, which I think is a step far beyond the scope of their authority. They had no interest in that, and their interest as manifested came gratuitously. What concern the Telegraphers would have with the merchant agents in declaring them per se independent contractors, is not appreciated by the Clerks' organization. That is what we are appearing before the
Retirement Board for, not to have our rights determined
2023 by The Order of Railroad Telegraphers,
through Vice-President Kearby.

Mr. Hassenauer: Mr. Examiner, I'd like to make a reply to that. I think that Mr. Morgan has misconstrued he request made by the Examiner of the parties in this hearing to set forth the positions of the various groups appearing before him as an Examiner with respect to the classes of individuals who are handling express shipments. This record does not show that the Clerks' organization represents the merchant agents, and the statement made by Mr. Kearby was given for the purpose of assisting the examiner and in giving our position with regard to the various groups of persons who are handling express who are before this Board.

Mr. Morgan: There is no misunderstanding on my part, Mr. Examiner, as to Mr. Kearby's statement. He preempted any interests the Clerks have by declaring it was the position of The Order of Railroad Telegraphers that these outside individuals, which he described as merchant agents, were independent contractors. That was gratuitous. That was not appreciated by the Clerks' organization.

Mr. Long: May I have a word, too?

Examiner Funk: Certainly, Mr. Long.

Mr. Long: The Express Agency has been waiting for a considerable time for an expression of the views of the Clerks as to their position with respect to merchant agents. That expression of views, as far as I know, has not as yet been forthcoming. I know of no particular merchant agent who is represented by the Clerks. I do know that there is in some cases a rather fine distinction between what has been considered to be a joint railroad-express agent and a merchant agent, and I welcome the expression of views of the Telegraphers, and I also would welcome an expression of the views of the Clerks.

Mr. Crawford: It is my understanding, Mr. Long, the Clerks stated their position at the opening of this hearing.
I don't see why from day to day we keep changing
2024 and stating our positions. Our position was stated
at the first hearing.

Examiner Funk:

Q. Mr. Kearby, would you give me your viewpoint on
s type of situation? Suppose we have a station out here
which an individual is performing work as agent for
Express Agency and as agent for the railroad company,
l has been concurrently performing such work for some
ie. The railroad is abandoned, or the station is closed,
minating the individual's railroad work, but he con-
ues to perform the express work. What is the position
the Telegraphers with regard to that man?

A. You mean the agent continues to perform the ex-
ss service?

Q. Yes.

Ir. Long: Could I have that question, please, again?

Examiner Funk's last question was read.)

Ir. Long: I have no objection to that question if there
l be incorporated in it a statement as to whether the
k as express agent is performed on railroad premises
is not performed—

xaminer Funk: Well, let him reply with respect to
h, Mr. Long.

Ir. Long: That's quite all right, but I want to be
the question incorporates that condition too.

. First as to the one who continues to perform the
k as express agent on railroad premises.

. Well, I should think that if he performs the work
railroad premises that he still has relation with the
ier and probably would have the same relation as he
prior to that time. But I might say this: that or-
rily when the railroad abandons a station, the em-
ee moves out of the station and to some other part
he railroad, and in the event there is no further con-
ion with the railroad and this is just an inland town
the Express Agency employs a merchant agent, I as-

sume that he would be considered as a merchant agent.
2025 I think I have answered both questions.

Q. What if that merchant agent you refer to was the same man as previously performed the joint railroad and express work?

A. Yes, but I can't conceive of such a condition or such a situation arising, unless it was some agent who had already reached retirement age and was ready to get out of the business, and was just waiting to take his annuity, or something like that, because under ordinary circumstances he would exercise his seniority to some other railroad or he would claim protection under what we term the Washington Job Agreement.

Q. If the railroad was abandoned, of course, or closed operations, the individual would have no place to exercise his seniority.

A. Oh, you mean the entire railroad. Pardon me. I was thinking just about part of the railroad.

Q. Yes.

A. Well, I don't know of any such instance in my experience ever having come up.

Q. What is the position of your organization, Mr. Kearby, with regard to assistants to joint agents?—Individuals who assist the joint agents in performing express and railroad work.

Mr. Hassenauer: Mr. Examiner, I think that statement is already on the record, that we regard those men as employees of the Express Agency.

Examiner Funk: You are not having Mr. Kearby testify at all, then, with regard to assistants?

Mr. Hassenauer: No. That is already on the record.
(Remarks off the record.)

Mr. Morgan: Mr. Examiner, in your inquiry with respect to assistants to the joint agent, just what people do ou refer to or have in mind when you refer to assistants to oint agents?

Examiner Funk: The individuals covered by the Express Agency's demand for refund.

026 Mr. Long: And as defined by Express Agency in a statement.

Examiner Funk: Yes.

Mr. Long: I think that eliminates those truck drivers ho operate trucks not belonging to Express Agency.—

Mr. Morgan: Take, for example, three-trick operators. hose people are not referred to as assistants. You don't iclude them.

Examiner Funk: I am not familiar with the individuals, Ir. Morgan.

Mr. Morgan: The three-trick operators, for instance, s defined by the Telegraphers' organization.

Mr. Hassenauer: They are included if they handled exress, Mr. Morgan. They are employees of Railway Exress Agency.

(Remarks off the record.)

Mr. Crawford: Mr. Examiner, I realize we are trying follow an orderly procedure and I think you have done emarkably well, and I think it is all well that we have an pportunity to say what we have in mind, but I want to back now to my questioning of Mr. Kearby. You will rell, and the record will show, that I asked Mr. Kearby if was familiar with the duties of merchant agents, and said he was not—

Witness: I did not say that. I cited a case at Eureka, inois—now, please don't misquote me—that I had to ow something about merchant agents or else I couldn't ve handled the case in my capacity as Vice-President of e Order of Railroad Telegraphers.

Mr. Crawford: I beg your pardon, Mr. Kearby. I dn't have reference to that. I asked you if the duties of merchant agents had remained the same, or substantially that.

Witness: You said if they had always remained the same, and I told you I wasn't acquainted with all of those. That was the question, and I don't know yet what has always been the situation with merchant agents.

Mr. Crawford: He did cite one isolated case. He
2027 said he didn't know personally; some of it was information from his organization. The fact is that practically all of his statements with reference to merchant agents being independent contractors was simply a conclusion of the witness, Mr. Kearby. I move to strike that part of his testimony which refers to merchant agents as being independent contractors, because it is simply hearsay and a conclusion of the witness.

Witness: Mr. Examiner, the statement which I made is the culmination of research by our organization, and it is not only through my knowledge but it is through the information and the records which our organization has on file in our offices, and it is impossible, of course, for one officer of the organization to know the situation all over the United States relative to merchant agents, although we do have quite a conclusive record and much information in our offices, and this statement which I made was based on that information. And I might add this: that I did not and I do not know at this time that the Clerks' organization as such represent the merchant agents. There is no disposition on my part to injure the Clerks in any way. I don't know that they do represent these merchant agents, that they have or do or that they intend to.

Examiner Funk: It is the understanding of the Examiner that Mr. Kearby's statement merely represents the position of The Order of Railroad Telegraphers with regard to the classes of individuals discussed by Mr. Kearby. In view of this, and after considering Mr. Crawford's ments regarding Mr. Kearby's statement—to wit, that s a conclusion of the witness—the Examiner feels that tatement as read by Mr. Kearby should remain in the d, and the Examiner will take due notice of the nents which have been made regarding the basis .

es anyone else have any further questions to ask of witness?

Mr. Crawford: I understand we don't have to note an exception to the ruling, do we?

Examiner Funk: That is your privilege.

. Crawford: Well, I'll note an exception.

aminer Funk: Note an exception by the Brotherhood ailway Clerks.

es anyone have any further questions to ask of the ss?

Morgan: Briefly, so that our position may be made on Mr. Kearby's testimony, on his desire to injure lerks or to assist them, it is my position that once terests of his organization had been set forth in his nony and protected, that it meant a period there. He on to get into the interests of the Clerks, which was ding the scope of his interests, or, I would say, au- y. That was the basis for the Clerks' objection, as ressed it.

aminer Funk: Well, Mr. Morgan, the Examiner in g his findings in this case intends to base them upon vidence, the facts that have been presented. I do tend to base my decision, or my recommendations I l say, upon the unsupported conclusions of any wit-

Morgan: That is quite satisfactory.

aminer Funk: Does anyone have any further questions to ask of Mr. Kearby before the witness is excused? Kearby, you are excused. Thank you for coming.

. Kearby was excused.)

(Remarks off the record.)

Examiner Funk: It is the understanding of the Examiner that the parties present here today are agreeable that this hearing be recessed until Monday, January 16, 1950, at which time The Order of Railroad Telegraphers will report as to their progress in checking the Railway Express Agency's Exhibits No. XXXI-A, B and C. The Examiner therefore recesses this hearing until 10:00 A. M., Monday, January 16, 1950.

(The hearing recessed at 11:30 A. M., November 21, 1949).

* * * * *

2038 Railway Express Agency, Incorporated.

Jurisdictional Docket No. 2-2A.

Index.

Exhibits		Page where offered and received
No. LXII	Copy of Agreement Governing Hours of Service and Working Conditions Between the Railway Express Agency and Employees Thereof Represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Effective September 1, 1949.	651

* * * * *

2061 Examiner Funk: After the Railway Express Agency submitted its Exhibits XXXI-A, B and C, the Examiner made a spot check of the Board's files with respect to individuals listed in those exhibits, and noted that there were a number of cases in which the individuals listed in the Exhibits XXXI-A, B and C had, according to our records, performed concurrent railroad and express service subsequent to January 1, 1937. The Examiner also noted

there were other instances in which our files contained
rmation indicating that the individual in question had
a payroll employee of the Express Agency or of one
iore of its predecessor companies. After this spot
k was made and the results were called to Mr. Long's
ation, he requested that the Examiner attempt insofar
ossible to prepare a list of these cases from the Board's
ds. A list was compiled, and I will now, at the sugges-
of Mr. Long and Mr. Hassenauer, take up the names
is list, one by one, and ask for the comments of the
es who have made an appearance here.

. Long: Mr. Examiner, for the purpose of the record,
I inquire as to the extent of the spot check?

aminer Funk: The original spot check or this later
?

. Long: The entire check that was made.

Examiner Funk: The check on which these lists
were compiled was prepared as follows. The Express
Agency's Exhibits XXXI-A, B and C were turned
to our General Files Unit. They then attempted to
e the files of all the individuals contained in those
-that is, Exhibits XXXI-A, B and C—which could
und in the Board's General Files and Annuity Files.
st be realized that the Board does not have files set
r individuals who commenced their railroad service
eir express service, as the case may be, subsequent
uary 1, 1937, or who were not in an employment re-
as of August 29, 1935, unless the individual has
d for an annuity or has died, or for some other reason
s corresponded with the Board. For that reason, it
sible that there may be a number of cases which
fall in these various categories which the Examiner
nable to pick up on the spot check. The Examiner
ishes to state that the names and Social Security
rs of the individuals who, according to our file rec-

ords, performed concurrent railroad and express service subsequent to January 1, 1937, were sent to our Bureau of Wage and Service Records, which then furnished the Examiner with additional data regarding those cases.

Mr. Long: Now, may also, Mr. Examiner, the record show that a copy of the two lists referred to by you was furnished the representatives of the Brotherhood of Railway Clerks, the representatives of the Telegraphers, and Express Agency.

Examiner Funk: The record may show that.

(Remarks off the record.)

Mr. Long: I can say for the record that I have gone over the names on the list entitled "Cases in which the individuals in question have, according to our records, performed concurrent railroad and express service subsequent to January 1, 1937." It has been checked against the Express Agency's records, and I understand also against the records of the Telegraphers, and Mr. Hassenauer and I jointly checked it and agreed with respect to the proper classification under Express Agency's classification given at a hearing held Thursday, July 28, 1949.

* * * * *

3626

BEFORE THE RAILROAD RETIREMENT BOARD.

In the Matter of the Status, Under the Railroad Retirement and Railroad Unemployment Insurance Acts, of Joint Agents, Merchant Agents, Branch Agents and Certain Other Individuals Performing Express Work, and the Demand of Railway Express Agency, Incorporated, for Refund of Contributions Based on Compensation of Such Individuals.

Jurisdictional Docket No. 2-2A.

RAILROAD RETIREMENT BOARD.

ie Matter of the Status, Under
› Railroad Retirement and
ilroad Unemployment Insur-
ce Acts, of Joint Agents, Mer-
ant Agents, Branch Agents
d Certain Other Individuals
rforming Express Work, and
› Demand of Railway Express
gency, Incorporated, for Re-
nd of Contributions Based on
mpensation of Such Individ-
ls.

Jurisdictional Docket
No. 2-2A.

REPORT OF THE EXAMINER.[1]

Introductory Statement.

an order dated October 28, 1937, the Railroad Retire- Board directed its then General Counsel, Lester P. ne, Esq., to hold a hearing and to act as Examiner of oard, to receive arguments and thereafter to formu- indings of facts and conclusions of law to enable the l to make proper answer to the following questions:

> "Are persons performing duties for the Railway ixpress Agency in return for compensation on a com- iission basis, and who devote substantial portions of

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[1] In this report "37R" refers to page or pages of the l of the 1937 proceedings; "38R" refers to the record 1938 proceedings, and "48R" ~~refers to the record of~~ roceedings which commenced in 1948. Similarly, A" refers to the page or pages of the transcript of al argument presented to the Examiner following the hearing; "380A" refers to the transcript of the oral ient presented to the Board following the 1938 hear- nd "480A" refers to the transcript of the oral argu- presented to the Examiner following the hearings commenced in 1948.

their time to other occupations, particularly railroad service, to be classified as employees under the Railroad Retirement Acts of 1935 and 1937?

"Is the time devoted to the performance of such duties for the Railway Express Agency, or its predecessors, creditable as "service" toward annuities under said Acts?"

This proceeding was later designated as Jurisdictional Docket No. 2.

In accordance with the Board Order, a hearing was held on December 15, 1937, at the Board's offices in Washington, D. C., in which hearing the Railway Express Agency, Inc. (hereinafter, with its predecessors, sometimes referred to as the "Express Agency"), The Order of Railroad
3628 Telegraphers (hereinafter somtimes referred to as the "Telegraphers"), and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter sometimes referred to as the "Clerks"), participated. Two representatives of the Bureau of Internal Revenue entered appearances at the hearing but did not otherwise participate in the proceedings. Subsequently, a brief was filed by the Express Agency and a joint brief was filed on behalf of the Telegraphers and the Clerks. The parties wished to present oral argument in support of their respective positions, and such argument was heard on January 17, 1938, at the offices of the Board, in which argument the Express Agency and the Telegraphers participated.

Transcripts of the proceedings at the hearing and the oral argument were submitted to the Board, as were the briefs filed by the respective parties, and, on March 19, 1938, the Examiner submitted to the Board his report, including discussion of the evidence, findings of fact, conclusions of law, and recommendations, for decision.[2] The

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[2] This report will sometimes hereinafter be referred to as the Examiner's First Report.

examined the above documents and considered the
evidence, the arguments of the respective parties
report of the Examiner. Thereafter, on March 24,
e Board made the following decision:

“(1) The Board approves and adopts the findings
fact made by the examiner: (2) The Board approves
l adopts the conclusions of law reached by the ex-
iner; (3) The Board adopts the report of the ex-
iner as its opinion in the disposition of the mat-
; and (4) The Board decides the questions stated
ts order of October 28, 1937, as recommended by
examiner in his report of March 19, 1938, formu-
ng the following rulings with respect thereto:
(a) The individuals described as ‘joint agents’ or
merchant agents’, while rendering service to the
lway Express Agency, Inc., are ‘in the service of’
Railway Express Agency, Inc., within the meaning
Section 1(e) of the Railroad Retirement Acts of
5 and 1937; such individuals are therefore em-
yees under the Railroad Retirement Act of 1937;
l they are also employees under the Railroad Re-
ment Act of 1935 if they were on or after Au-
29, 1935, in the service of or in an employment
tion to the Railway Express Agency, Inc., or were
rwise employees as defined in that Act: and
(b) The time devoted by such individuals to the
ormance of their duties for the Railway Express
ncy, Inc., is creditable as service toward annuities
r the Railroad Retirement Acts of 1935 and 1937,
ect to provisions of said Acts pertaining to the
itability of service toward annuities.”

ter dated April 16, 1938, counsel for the Express
ook exception to the Examiner's report in certain
and requested leave to present additional facts
e Examiner and thereafter leave to argue the issues
e Board in banc. The Board gave full considera-
his request and, on May 31, 1938, entered the
order:

t is hereby ordered and directed (1) that Jurisdictional Docket No. 2 be reopened with leave to all parties who have entered appearances in the matter to present further evidence and arguments before the Examiner on June 20, 1938, or such other date as the Examiner may fix to meet the convenience of all parties, upon the questions constituting the subject matter of the inquiry;

(2) That the evidence be directed so far as possible to the presentation of evidence not heretofore in the record, that repetition be avoided, and that argument be directed to new matters and toward such specific matters in the Examiner's report as are claimed to be in error;

(3) That particular attention be directed to the presentation of more complete evidence regarding the status of merchant agents;

(4) That decision be reserved upon the question whether argument before the Board in banc shall be permitted."

Pursuant to the above order, the Examiner held a hear-
ng on August 5, 1938, in the offices of the Board at Wash-
gton, D. C., in which hearing the Express Agency and
h Telegraphers participated. At the conclusion of the
earing, it was agreed that a proposed report be issued
y the Examiner, on the basis of which both parties to the
earing would be given an opportunity to file exceptions
and to request oral argument on the exceptions be-
3630 fore the Board. Briefs were filed by the Express
Agency and the Telegraphers, respectively. There-
after, a transcript of the proceedings at the rehearing,
nd the Examiner's report on that hearing, were submitted
o the Board.[3] The Express Agency filed exceptions to
his report and requested oral argument before the Board.
he Telegraphers filed a reply to these exceptions. O
rgument before the Board was held on June 9, 1939, at

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[3] This report will hereinafter sometimes be referred o as the Examiner's Second Report.

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ices of the Board, in which argument the Express
y and the Telegraphers participated.

Board examined the transcripts, briefs, exceptions,
and Examiner's report relating to the rehearing, and
ered the entire evidence at both hearings, all the
ents of the respective parties and both reports of the
ner. Thereafter, on August 1, 1939, the Board
he following decision (B. O. 39-502):

"(1) The Board approves and adopts the findings
fact made by the Examiner in his report of March
, 1938, as supplemented by the findings of fact in
report on the rehearing of August 5, 1938;

"(2) The Board approves and adopts the conclu-
ons of law reached by the Examiner in his report of
arch 19, 1938, as supplemented by the conclusions
law in his report on the rehearing of August 5, 1938;

'(3) The Board adopts as its opinion in the dis-
sition of this matter the Examiner's report of
arch 19, 1938, as supplemented by his report on the
earing of August 5, 1938, and supplemented fur-
r by the foregoing discussion of the Express Ag-
y's exceptions to the Examiner's report on re-
aring;

'(4) The Board decides the questions stated in
order of October 28, 1937 as recommended by the
aminer in his report of March 19, 1938, supplemented
his report on the rehearing of August 5, 1938; and
Board hereby formulates the following rulings with
pect to those questions:

> "(a) The individuals described as 'joint agents' or as 'merchant agents', whether paid on a commission basis or a 'fixed allowance' basis, are, while rendering service to the Express Agency, 'in the service of' the Express Agency, within the meaning of Section 1(c) of the Railroad Retirement Acts of 1935 and 1937; such individuals are therefore employees under the Railroad Retirement Act of 1937; and they are also employees under the Railroad Retirement Act of 1935 if they were on or after August 29, 1935, in

> the service of or in an employment relation to the Express Agency or were otherwise employees as defined in that Act;
>
> "(b) The time devoted by such individuals to the performance of their duties for the Express Agency is creditable as service toward annuities under the Railroad Retirement Acts of 1935 and 1937, subject to provisions of said Acts pertaining to the creditability of service toward annuities;
>
> "(c) This decision does not apply to cases in which a company or other entity not an individual is designated as agent of the Express Agency; in such cases, an investigation will be made to determine which individuals, if any, are rendering service subject to the continuing authority of the Express Agency to supervise and direct the manner of rendition thereof. Nor does this decision determine whether a joint or merchant agent who also performs pickup and delivery service for the Express Agency is, with respect to such pickup and delivery service, an 'employee' within the meaning of the Act of 1935 or 1937; the status of such agents will be determined on the basis of the facts in each particular case."

The Express Agency did not seek judicial review of the Board's decision of August 1, 1939, and the service rendered to the Express Agency by the individuals described in the Board's decision as joint agents and merchant agents was thereafter included in the computation of annuities awarded such individuals under the provisions of the Railroad Retirement Acts.[4] However, while the Express

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[4] Administrative finality has attached to the certification of these annuities and they cannot now be reopened. (See Opinion L-39-527, 1939 R. R. 83, issued by the General Counsel of the Railroad Retirement Board on August 16, 1939, "Reopening by the Board of final decisions on claims for benefits under the Railroad Retirement Acts of 1935 and 1937".) Under the Board's regulations, however, in cases where no annuity has as yet been awarded,

Agency did not appeal from the Board's decision it paid the taxes assessed by the Bureau of Internal Revenue, under the provisions of the Carriers Taxing Act (now Railroad Retirement Tax Act), on the compensation of joint agents, merchant agents, branch agents and certain other individuals performing express work, under protest, and later filed claim for the refund of such taxes. These claims for refund were disallowed by the Bureau of Internal Revenue in May, 1944. Approximately two years later, in
1946, the Express Agency brought suit in the United
3632 States District Court for the Southern District of
New York (*Railway Express Agency, Incorporated* v. *Joseph T. Higgins, Collector of Internal Revenue*, Order of Railroad Telegraphers, Intervenors, Civil Action No. 35-688) to recover the amount which it had paid in taxes.

The Express Agency also contended that the individuals referred to above were not employees within the meaning of the Railroad Unemployment Insurance Act, and it paid the contributions required by that Act under protest. Later it made formal demand upon the Railroad Retirement Board, under Section 5(e) of the Unemployment Insurance Act, for the refund of contributions based upon the compensation of such individuals.

On June 23, 1948 (B. O. 48-229), the Board reopened Jurisdictional Docket No. 2, and authorized and directed Omer M. Funk, an employee of the Board, to hold a hear-

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the fact that the agent's express service and compensation has been included in establishing his prior service record with the Board will not prevent the Board from determining upon the filing of an application for an annuity that some or all of the service or compensation so recorded is not service or compensation under the Acts or that under the provisions of such Acts some or all of the service or compensation so recorded is not to be used in the computation of an annuity (20 CFR 299.60). *Compare Adams* v. *Railroad Retirement Board*, 214 F. 2d 534, 538 (footnote 9) (C. A. 9, 1954).

ing, and to act as the Board's Examiner, for the purpose of determining the following questions:

> "(a) Are joint agents, merchant agents, branch agents, and certain other individuals performing express work, to be classified as employees under the Railroad Unemployment Insurance Act, and is the Railway Express Agency, Incorporated, entitled to a refund of contributions, under the Act, based on the compensation of such individuals?
>
> (b) Are joint agents, merchant agents, branch agents, and certain other individuals performing express work, to be classified as employees under the Railroad Retirement Acts of 1935 and 1937?"

This proceeding has been designated as Jurisdictional Docket No. 2-2A.

In accordance with the Board Order, notice of the hearing was published in the Federal Register, and mailed to the Railway Express Agency, Incorporated; The Order of Railroad Telegraphers; the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes; the Railway Labor Executives' Association; the Commissioner of Internal Revenue; the Social Security Administrator of the Federal Security Agency; the National Mediation Board; the National Labor
Relations Board; the Interstate Commerce Commis-
3633 sion, and the Wage and Hour and Public Contracts
Division of the Department of Labor. The Express Agency also served copies of the notice, by mail, on individuals designated by it as merchant agents, assistants to merchant agents and branch agents. Hearings were held in Chicago, Illinois, on August 10, 11, 12, November 15 and December 13, 1948; January 17 and 31, March 14, 15 and 16, July 18 and 28, and November 21, 1949, and January 16, March 20, May 1, 8, 22, 23 and 24, June 12, August 7 and November 6, 1950. The Express Agency, the Telegraphers, the Clerks, and two express agents, C. C. Harri-

on of Rockville, Indiana, and A. H. Burns of Sparta, Illi-
ois, entered appearances in the Hearings. Briefs were
led by the Express Agency and the two labor organiza-
ons in February, 1952, and reply briefs were filed by the
xpress Agency and the Clerks on January 26, 1953. Oral
rgument was presented to the Examiner by the Express
gency and the two labor organizations on October 6,
54. Transcripts of the proceedings in both Jurisdic-
onal Docket No. 2 and in Jurisdictional Docket No. 2-
A, including transcripts of the various oral arguments,
e attached hereto, and are made a part of this report.

The Railway Express Agency, Incorporated, a Delaware
rporation, is a common carrier engaged in the transporta-
on of property and express throughout the United States,
anada, Cuba, Alaska and Hawaii.[5] As such it is sub-
ct to Part I of the Interstate Commerce Act, and various
gulatory laws of the United States and the various
ates. The Express Agency was organized by certain car-
riers operating railroads in the continental United
24 States as their own joint express agency or facility
for the conduct of express business. It began opera-
ns on March 1, 1929, and, with respect to its express
siness, is successor to the American Railway Express
mpany which had conducted express transportation busi-

. In *Fleming* v. *Railway Express Agency, Inc.*, 161 F.
659 (1947), the Court of Appeals for the Seventh Cir-
t, in holding that the Express Agency was a "*common*
rier or other public utility" within the meaning of the
ergency Price Control Act, said at page 661:

> "We are convinced that a common carrier is one who, for hire, engages in transporting commodities from one place to another, or in connection with another carrier, such as a railroad. *It does not step outside its common carrier status because it only renders part, though a necessary part, of a transportation service, or because it renders its service as an agent of a common carrier.*" (Emphasis supplied.)

ness since July 1, 1918, when it succeeded the Adams Express Company, the American Express Company, the Southern Express Company and Wells Fargo & Company, the principal express companies operating in the United States at that time.

The Express Agency conducts express operations by rail, water, motor vehicle and air. Its rail operations are conducted over the lines of the principal railroad companies in the United States by virtue of a contract with each railroad over whose line it operates. These contracts are uniform in their terms and follow a form known as the Standard Express Operations Agreement, and are similar in their terms to contracts previously existing between the American Railway Express Company and the various railroads.

For operating purposes, the organization of the Express Agency has been divided, on a geographical basis, into four sections or divisions, each of which is under a Vice-President. The four geographical divisions are the Eastern Department with headquarters at New York; the Central Department with headquarters at Chicago; the Southern Department with headquarters at Atlanta, and the Western Department with headquarters at San Francisco. These four operating departments are sub-divided into smaller departments which are headed by general managers. Under the general managers are the division superintendents who have direct jurisdiction over all route agents (now called division supervisors),[6] agents and messengers in their respective divisions.

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[6] According to Vice President Owens of the Express Agency:

> "The Route Agent is the official having direct supervision over the company's operation at joint railroad express offices and their commission agencies; also jurisdiction over small exclusive offices. The Route Agent reports direct to and is under the direct supervision of the Superintendent. The Superintendent has

3635 In 1948 the Express Agency had approximately 22,000 agencies in the United States, Canada, Cuba, Hawaii and Alaska. At each of these agencies it was represented by an agent who falls into one of the following four general classifications: salaried agents, commission agents, fixed allowance agents,[7] and limited (branch) agents. Except for the limited (branch) agents these individuals are the official representatives of the Express Agency in their respective communities. The limited (branch) agents have their agencies (actually sub-agencies) within the pickup and delivery limits of a regular salaried agent who is the official representative of the Express Agency in that community. The agencies operated by the salaried, commission and fixed allowance agents are listed in the Express Agency's Official Directory of express

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> jurisdiction over a division, exercising, as stated, that supervision through Route Agents in so far as the smaller points are concerned, and the agents at exclusive offices." (37R, 32-33.)

Vice President Owens also states that:

> "The Route Agent represents the Agency in all of its contacts with the public and the agents at offices over which he has jurisdiction; he checks the accounts, supervises generally the conduct of the company's business to see that the company's rules and regulations are observed, solicits business from patrons, and is generally the representative of the company in any activity that may require the assignment of an exclusive individual—an individual exclusively employed to carry on any of the company's activities." (37R, p. 33.)

[7] During the 1948 proceedings the Express Agency ontended that offices where the agent was paid on a fixed llowance basis should be considered commission offices. lowever, in the 1937 proceeding when the Telegrapher's ttorney, Mr. Hassenauer, questioned Vice President Owens bout joint agents paid on a fixed allowance basis, the Exress Agency's attorney, Mr. Hartung, objected to such uestioning on the ground that the proceeding only involved he status of individuals paid on a commission basis.

offices. However, the limited (branch) agencies, not being express offices, are not included in the directory.[8] For the purposes of this report, these four general classifications may be further defined and divided as follows:

(1) Salaried agents.

Individuals, in charge of agencies, who devote all of their working time to Express Agency service,
3636 and who are paid therefore on a wage or salary basis from the regular pay roll. These individuals are also sometimes referred to as "exclusive employees". The Express Agency concedes that these individuals are its employees.

(2) Individuals, in charge of agencies, who devote all or some part of their working time to Express Agency service and who are paid therefore on a commission basis (usually 10% of the business handled). Included in this general classification are individuals who have been referred to in these proceedings as exclusive commission agents, joint railroad-express agents, caretaker or custodian agents, and merchant agents,[9] as well as certain other commission agents

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[8] At the Hearings in Jurisdictional Docket No. 2-2A the branch agency at Wauwatosa, Wisconsin, was mentioned as being included in the Directory. However, the Express Agency's witness, Mr. Gross, testified at page 541, that branch agencies are not listed as such in the Directory, and that the Directory did not purport to show the "number of or location of any branch agent." He pointed out that Wauwatosa had been a joint-railroad-express agency prior to the establishment of the branch agency, and that it had not been removed from the Directory when the branch agency was established.

[9] In some instances individuals referred to in express circles as exclusive commission agents, joint railroad-express agents, caretaker or custodian agents, and merchant agents have actually been paid a fixed allowance or stated sum per month instead of a commission. For the purposes of this report these individuals will hereinafter be referred to under the general classification of "fixed allowance agents".

ot falling wholly within any of the preceding groups. or the purposes of this report the commission agents ay be further defined as follows:

(a) Exclusive commission agents.

Individuals in charge of agencies who generally devote their entire working time to Express Agency service, but may, in some instances, engage in an independent business of their own, and who perform their express work on premises owned or controlled by the Express Agency or the railroad through ownership, lease or some other arrangement. These individuals are also sometimes referred to as "exclusive agents". The Express Agency concedes that these individuals are its employees.

(b) Joint-railroad express agents.[10]

Individuals who serve as railroad agents and who concurrently with, or in addition to, their railroad work also serve as agents for the Express Agency. These individuals have also been referred to as "joint agents" and as "joint employees".[11] Included in this group are those who devote all of their working time to their work as joint railroad-express agents, and those who are also engaged in some other business activity or activities. All of these individuals have been conceded by the Express Agency to be its employees except those who m y perform their express work, or both their railroad and express work, on premises not controlled by either the Express Agency, or the rail-

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n some parts of the country the terms subagent ich agent have also been applied to the joint rail ress agents, the term apparently being used inter bly.

he terms "joint agent" and "joint employee" o sometimes been used in express circles to refer ituation where a railroad employee other than a agent serves the Express Agency as its agent on premises. These individuals are also considered xpress Agency to be its employees.

road, through ownership, lease, or some other arrangement.

(c) Caretaker or custodian agents.[12]

Individuals who are employed by a railroad as 3638 the caretaker or custodian of its station and who also serve as an agent for the Express Agency.[13] All of these individuals have been conceded by the Express Agency to be its employees except those who perform their express work on premises not controlled by the Express Agency or the railroad through ownership, lease, or some other arrangement.

(d) Merchant agents.[14]

Individuals in charge of agencies who generally are also engaged in some other business activity or activities,[15] and who perform their express work

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[12] These caretaker or custodian agents have sometimes been referred to as "sports" by the attorney who represented the Express Agency in the 1948 proceedings.

[13] In cases where these individuals have also been engaged in other business activities outside the railroad industry, and their express work has been performed on premises not controlled by the Express Agency, or the railroad, through ownership, lease or some other arrangements, they have sometimes been referred to as merchant agents. For the purposes of this report, however, these individuals will be considered as coming within the classification of caretaker or custodian agents.

[14] In some instances these individuals have been paid a percentage of the express revenue received at the agency plus a stated sum per month, or a stated amount per shipment, for the performance of some service such as express pick-up and delivery work or for furnishing some facility. These individuals have sometimes been referred to as commission-plus agents.

[15] Although the Express Agency in defining merchant agents for the purposes of the 1948 proceedings, stated that some of them were "corporations or partnerships", it identified individuals rather than "corporations or partnerships", as the merchant agents at the various localities

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on premises not under railroad or Express Agency control through ownership, lease or some other arrangement. Included in this group are individuals who may devote some portion of their working time to railroad service other than station agent, caretaker or custodian service. The Express Agency contends that all these individuals are independent contractors.

(c) Other commission agents[16]

Individuals engaged in railroad work other than station agent, caretaker or custodian service, who perform their express work on premises under railroad or Express Agency control, individuals who perform no railroad work, but who operate their express agency on railroad premises under an agreement between the Express Agency and the railroad, and individuals who conduct their express agency, and perhaps also engage in other business activities, on premises for which the Express Agency pays rent to a third party.[17] The Express Agency concedes that these individuals are its employees.

) Fixed Allowance Agents[18]

dividuals in charge of agencies who devote some

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y such agents (1948 Exhibits XXXI ABC). In this on it may be noted that in the Examiner's Second p. 10) it was stated that of the 1,469 agents, de- by the Express Agency as merchant agents, who ving the Express Agency in March 1937, all were ls "with the possible exception of twelve, which scribed as 'companies' engaged in Trucking. Bus and Taxi business."

nese other commission agents, not falling wholly y of the other classes of commission agents, have s been referred too as "sports" by the attorney esented the Express Agency in the 1948 proceed-

nese individuals have sometimes been included e merchant agent classification.

express circles this term has sometimes been fer to joint railroad-express agents who are paid

or all of their working time to express work and who are paid therefor on the basis of a fixed allowance or stipulated amount per month. Included in this general classification are the individuals sometimes referred to as contract agents,[19] and those individuals
3640 sometimes referred to as exclusive commission agents, joint railroad-express agents, caretakers or custodian agents, and merchant agents who are paid a fixed allowance or stipulated amount per month instead of a commission. The Express Agency concedes that, except for those who perform their express work on premises not under express or railroad control through ownership, lease, or some other arrangement, the individuals referred to in this report as fixed allowance agents are its employees.

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a fixed allowance or stipulated sum per month for their express work instead of a commission. As used in this report, however, the term is meant to include all express agents, other than the salaried, branch or limited agents, who are paid a fixed allowance or stipulated sum per month for their express work.

[19] At pages 323-324 of the Hearing in Jurisdictional Docket No. 2-2A, the Express Agency's attorney, after stating that caretaker or custodian agents paid a fixed monthly allowance instead of a commission may have at times "been referred to by our officials as contract agents", went on to state: "I might add that the term contract agent generally in the express business refers to an agent who is paid a stated sum per month for the conduct of the entire agency, and who has been considered in the same light as an exclusive commission agent. However, in some cases our people have loosely referred to contract agent as applying to any agent who may be paid a stated allowance per month and who in fact may be a merchant agent, a branch agent, a custodian agent, a caretaker agent, an exclusive commission agent. In other words, the mere fact that an individual is paid a stated allowance per month does not truly identify him, although that characteristic has been used by some of our people as identifying the man wrongly as a contract agent."

(4) Limited (branch) agents [20]

Individuals, hotels, YMCA's, warehouses, retail
ores and the like who act as agent for the Express
ency in performing a part or all of the following
rk in connection with express business: [21] (a) re-
pt for express or baggage transfer shipments on
ir premises, which shipments are picked up by the
press driver; (b) permit undelivered express ship-
nts to be held at their premises for call by the con-
nee; (c) receive calls, usually by telephone, request-
that a driver of the Express Agency pick up a
pment at a designated address, and transmit such
s to either an express driver or agent, and (d)
fluence students and others to use express service
the transportation of their baggage and laundry.
se agents are usually paid on the basis of a speci-
amount per call or shipment but are in a few
ances paid a commission or a stated sum per
th. Included in this group are those who have
referred to in express circles as branch agents,
nch package receiving agents, subagents, influenc-
agents, campus representatives, and call agents.

lition to the express agents the Express Agency
in its service, among others,

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n its demand for refund the Express Agency re-
the individuals in this group as "Branch Agents".
, in the course of the Hearings in Jurisdictional
o. 2-2A it was developed that the Express Agency
ch agents who are its full time salaried employees,
nch agents who are railroad employees paid on a
on basis for their express work. The Express
concedes that these individuals are its employees,
rder to distinguish the employee branch agents
se who it contends are independent contractors,
l to refer to the latter as limited agents.

appears that the Express Agency does not always
some individual in the various enterprises to
e limited (branch) agent. (See Exhibit XLVIII,
enterprises, rather than individuals, are some-
ed as the agent.)

(1) Individuals who devote all of their working time to express service, and who are paid therefore on a wage or salary basis from the Express Agency's regular payroll. These individuals are sometimes called "exclusive employees". The Express Agency concedes that these individuals are its employees.

(2) Individuals who perform service for both the Express Agency, and one or more railroads, and who are paid either by the Express Agency or by a railroad company on a salary basis from the regular pay roll for both their express and railroad service. These individuals are sometimes called joint employees. The Express Agency concedes that these individuals are its employees.

(3) Individuals who assist the joint railroad-express agents, merchant agents, and limited agents in performing express work. The individuals regularly employed by the joint railroad-express agents to assist them at the railroad station, and those regularly employed by them to perform pick-up and delivery work in vehicles owned by the joint railroad-express agent, and who also perform platform work or railroad work in addition thereto,
3642 are considered by the Express Agency to be its employees. However, it considers the other assistants to be employees of independent contractors.

(4) Individuals referred to in the Express Agency's claim for refund as "All Others". These individuals perform janitor service, station transfer service, meet trains, etc. They are paid directly by the Express Agency and perform their express service on express or railroad premises. The Express Agency states that it would be impracticable for the purpose of this hearing to define each claimant within this class and it has waived its claim as to them.

In its demand for refund the Express Agency identified the individuals covered thereby as (1) merchant agents and their assistants, (2) joint railroad-express agents and

their assistants, (3) branch agents, and (4) all others. In the Board's order directing these proceedings the individuals were referred to as joint agents, merchant agents, and certain other individuals performing express work. At the hearings, the Express Agency conceded that the joint railroad-express agents, their assistants,[22] and all full-time employees of railroads who handle express are its employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts. In the course of the Hearings the Express Agency also conceded, in substance, that the individuals designated in its demand for refund as "All Others" were its employees. Later,
however, the Express Agency stated that it was not
3643 conceding that they were employees, but was merely
waiving its claim for refund with respect to them. In view of the foregoing the only individuals, involved in these proceedings, whose status is actually now in dispute between the parties who filed appearances in the Jurisdictional Docket are those referred to in the proceeding as (1) merchant agents and their assistants; (2) joint railroad-express agents, caretaker or custodian agents, and fixed allowance agents, who perform their express work,

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[22] The Express Agency originally conceded, without any qualification, that assistants to joint railroad-express agents are its employees. When asked to define the assistants the Express Agency's attorney stated that "We might define assistants, helpers and employees of joint agents as all those individuals who are reported to Railway Express Agency, Incorporated, by said joint agent as his helpers, assistants and employees on Railway Express Agency Form 7051." (48R. 16.) Later, however, the Express Agency stated that the only assistants which it considered to be its employees were individuals regularly employed by the joint-railroad express agents to assist them in the performance of express work at the railroad station, and those regularly employed by them to perform pick-up and delivery work in vehicles owned by the joint agent, and who also perform platform work or railroad work in addition thereto.

or both their railroad and express work, on premises not under railroad or Express Agency control; (3) certain individuals who assist the joint railroad-express agents, caretaker or custodian agents, and fixed allowance agents, in performing their express work, other than the group of assistants to joint railroad-express agents who have been conceded by the Express Agency to be its employees, and (4) limited (branch) agents and their assistants.

3644 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS.

Upon the entire record in these proceedings the Examiner makes the following findings of fact, conclusions of law, and recommendations:

Findings of Fact.

1. Railway Express Agency, Incorporated, was organized by certain carriers operating railroads in the continental United States as their own joint express agency or facility for the conduct of express business. It began operations on March 1, 1929, and, with respect to its express business, is successor to the American Railway Express Company which had conducted express transportation business since July 1, 1918, when it succeeded the Adams Express Company, the American Express Company, the Southern Express Company and Wells Fargo & Company, the principal express companies operating in the United States at that time.

2. The Express Agency is a common carrier engaged in the transportation of property by express throughout the United States, Canada, Cuba, Alaska and Hawaii. As such it is subject to Part I of the Interstate Commerce Act, and various regulatory laws of the United States and of the several states. It is also an "employer" within the

meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts.

3. The Express Agency conducts express operations by rail, water, motor vehicle and air. Its rail operations are conducted over the lines of the principal railroad companies in the United States by virtue of a contract with each railroad over whose line it operates. These contracts are uniform in their terms and follow a form known as the Standard Express Operations Agreement.

4. Each railroad company executing the Standard Express Operations Agreement thereby appointed the Express Agency as its exclusive agent for the conduct and transaction of the express transportation business. Under the terms of the agreement the Express Agency has
3645 agreed to furnish adequate and suitable equipment, and to use its vehicles, property, offices, and other facilities, and its agents and employees in operating an express transportation business as agent of the railroad company, and in the conduct of such business to exert itself in all proper ways to make the business satisfactory to the public and the railroad company.

5. The business of the Express Agency is to forward by rapid conveyance, shipments of merchandise, perishables, freight live stock, live animals, jewelry, bullion, coin, currency, bonds, valuable papers, etc., and to deliver same promptly; to make collections with or without goods; to fill orders; to attend to commissions; and to sell and pay money orders, travelers cheques, etc.

6. In addition to its express transportation work the Express Agency act as agent for the sale of travel services, American Express Company Money Orders, Travelers Cheques, Foreign Money Orders, Unlimited Checks and other financial paper transactions. The Express Agency also performs many classes of service for the railroads, i. e., station work, pickup, delivery and transfer of L.C.L.

freight and passenger baggage, U. S. Mail, etc. Additionally, services are performed for others as acceptance of telegrams, customs brokerage, and transfer of U. S. Mail to and from airports.

7. The unit of express operation is the local office or agency. The responsible official in charge of every express office is the agent, or in his absence the duly authorized acting agent.

8. The Division Superintendent acting under a General Manager, who in turn is subject to an Operating Vice-President, has direct jurisdiction over all Route Agents (now called division supervisors), agents and messengers in his division. The Route Agent (division supervisor) is his personal representative.

9. The local express agent has jurisdiction over his office and its branches, and authority over employees within his jurisdiction.

10. Prior to enactment of the Railroad Retirement leg-
islation accountants in the express service were only
3646 interested in two general categories of express
agents, namely, those that were paid on a salaried
basis and those that were paid on a commission basis. With the passage of this legislation, however, it became essential for them to distinguish between the various classes of commission agents in order to develop their relationship with the Express Agency.

11. In 1948 the Express Agency had approximately 22,000 agencies throughout the United States, Canada, Cuba, Hawaii and Alaska. At each of these agencies it was represented by an agent who, for the purposes of this report, can be said to fall into one of the following general classifications: salaried agents, commission agents, fixed allowance agents and limited agents. The great majority of these agencies are commission offices. Except for the limited agents these agents are official representatives of

the Express Agency in their respective communities. The limited agents have their agencies (actually subagencies) within the pickup and delivery limits of a regular salaried agent who is an official representative of the Express Agency in that community. The agencies operated by the salaried, commission and fixed allowance agents are listed in the Express Agency's Official Directory of Express Offices in the United States. However, the limited agencies, not being express offices, are not listed in the Directory.[23]

12. The salaried agents are admitted to be employees.

13. The commission agents include (1) individuals who generally devote their entire working time to express service, but who may, in some instances engage in other business activities, and who perform their express work on premises under railroad or Express Agency control through ownership, lease or some other arrangement, which individuals will, for the purposes of this report, hereinafter be referred to as "exclusive commission agents"; (2) individuals serving as railroad agents who con-
3647 currently with, or in addition to, their railroad work
also serve as agents for the express agency, usually on railroad premises, and who may also be engaged in other business activities, which individuals will, for the purposes of this report, hereinafter be referred to as "joint agents" or as "joint railroad-express agents"; (3) individuals employed by a railroad as the caretaker or custodian of its station who also serve as agent for the Express Agency and who may also be engaged in other business activities, which individuals will, for the purposes of this report, hereinafter be referred to as "caretaker or custodian agents"; (4) individuals serving as

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[23] It is, of course, possible that when an agency which has been listed in the Directory is changed to a limited agency the community in which it is located may continue, for a time at least, to be listed in the Directory. However, limited agencies, as such, are not listed in the Directory.

express agents on premises not under railroad or Express Agency control through ownership, lease or some other arrangement, who are also generally engaged in other business activities, including in some instances railroad service other than station agent, caretaker or custodian service, which individuals will, for the purposes of this report, hereinafter be referred to as "merchant agents"; and (5) individuals engaged in railroad work other than station agent, caretaker or custodian service, who perform their express work on premises under railroad or Express Agency control; individaals not engaged in railroad work who perform their express work on railroad premises under an agreement between the Express Agency and the railroad, and individuals who conduct their express agency, and perhaps also engage in other business activities, on premises for which the Express Agency pays rent to a third party, which individuals will, for the purposes of this report, sometimes hereinafter be referred to as "other commission agents". The Express Agency concedes that the individuals in groups (1) and (5), and those in groups (2) and (3) who perform their express work on premises under Express Agency or railroad control through ownership, lease or some other arrangement, are employees. However, it denies that the individuals in group (4), and those in groups (2) and (3) who perform their express work on premises not under Express Agency or railroad control, are employees. In some instances the commission agents are paid an allowance in addition to their
3648 regular commission, for pickup and delivery or other
extra services. In such cases the agents are sometimes referred to as commission-plus agents.

14. The class or type of express office in a particular locality is subject to change at any time by the Express Agency. In some cases a change in the classification of the office may also result in a change in the classification of the incumbent agent.

15. Commission agents and their assistants perform various express services such as the receipt and delivery of express shipments, including valuable shipments; the collection of transportation charges, including C.O.D. charges; making various regular reports to the Express Agency, including the regular remittances of funds; selling financial paper; maintaining a register of shipments; making out claim papers when necessary; making out receipts and waybills; meeting trains; performing express pick up and delivery work, and maintaining a "call book" for the express pick up and deliveryman, when the pick up and delivery service is not performed by the commission agent or his assistants. However, some of these various services are not carried on in all commission offices; for example, not every commission office performs express pick up and delivery work and not every commission office sells financial paper.

16. Fixed allowance agents differ from commission agents in that they are paid a fixed allowance or stipulated sum per month instead of a commission. Except for those who perform their express work on premises not controlled by the Express Agency or railroad through ownership, lease or some other arrangement, the individuals referred to in this report as fixed allowance agents are considered by the Express Agency to be its employees. The fixed allowance agents conceded to be employees have sometimes been referred to in express circles as contract agents, and in some instances as exclusive commission agents, joint agents or as caretaker or custodian agents.

17. The limited agents include individuals, hotels,
YMCA's, warehouses, retail stores, and the like, who
3649 are located within the pickup and delivery limits of
a regular salaried agent, and who perform on premises owned or controlled by them, a part or all of the following work in connection with the express business: (a)

receipt for express or baggage transfer shipments, which shipments are picked up by an express driver; (b) permit undelivered express shipments to be held on the premises until called for by the consignee; (c) receive calls, usually by telephone, requesting that an express driver pick up a shipment at a designated address, and transmit such calls to either an express driver or agent; and (d) influence students and others to use express service in the transportation of their baggage and laundry. These limited agents are usually paid a specified sum for each shipment or call received, but in a few instances are paid a commission or fixed allowance. In Express circles these agents have sometimes been referred to as branch agents, branch package receiving agents, subagents, influencing agents, campus representatives, and call agents.

18. With the exception of the limited agents, the individuals in charge of the express agencies have generally been furnished with a copy of the Express Agency's "General Rules and Instructions".[24] Both the 1924, 1936 and 1948 issues of this book contain, in the beginning, the following "Notice to Employes":[25]

> "The Rules, Instructions and Information contained herein are intended for the guidance and use of the Company's employes only. The business of the Company must be transacted strictly in accordance therewith.
>
> "Employes must make a thorough study of these Rules and Instructions. The plea of ignorance will not be accepted as excuse for mistakes made in transacting any part of the business.

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[24] In a few instances limited agents have been furnished with a copy of the Express Agency's "General Rules and Instructions", but this has usually been at their own request.

[25] Unless otherwise specified, all references to the "General Rules and Instructions" in this report will be to the 1936 edition (Exhibit 8 in the first (1937) hearing).

"These Rules and Instructions are based on the character of forms and the conditions which prevail at the majority of offices. At offices where the use of special forms of waybills, delivery sheets, etc., has been authorized, employes will be governed by the instructions issued in connection with such special forms.

3650 "Special instructions heretofore issued by circulars, unless superseded by rules laid down in this book, remain in force."

19. The "General Rules and Instructions", consisting of some 1155 rules and instructions relating to various phases of the express business, are divided into five parts: (1) Operation, (2) Loss and Damage Prevention, (3) Organization, (4) Management, and (5) Property. Under Parts (1) and (2) are included rules for the acceptance, transportation and delivery of shipments, and their protection from disappearance and injury. Under parts (3) and (4) are included the regular duties of agency and messenger forces and the business involved in carrying on an agency. Under part (5) are found the rules for acquiring, disposal and care of the Express Agency's supplies, property and equipment. All of these rules and instructions apply generally to merchant agents, except those which are restricted in their application to individuals other than merchant agents, or which do not relate to the duties of merchant agents, or which refer to some service not performed at, or some equipment or facility not furnished at, a particular merchant agency.

20. In addition to its "General Rules and Instructions" the Express Agency also issues, through its authorized officers or representatives, various circulars and bulletins relating to the conduct of the express business, and which sometimes relate to the methods of doing the details of the work. While these are sometimes addressed to "all agents", "all employees", "all commission agents", and, in

some cases to agents at specific locations, only a few of them are sent to the limited agents.

21. The commission agents are also required to follow the Express Agency's Circular No. 93-A, "General Accounting Instructions for Commission Office", and all agents handling explosives and other dangerous articles are required to comply with the Interstate Commerce Regulations for the "Transportation of Explosives and Other Dangerous Articles by Express."

3651 22. All agents, except the limited agents, are generally required to complete the Express Agency's Form No. 100, "Application for Employment", at the time they enter the service of the Express Agency. However, only those entering the exclusive service of the Express Agency are required to furnish personal photographs and statements of their previous employment records. Prior to November, 1945, this form also contained an "Application for Fidelity Bond and Agreement as to Losses by Negligence and Defalcation". The limited agents, on the other hand are, with the exception of the campus representatives, generally required to enter into a uniform written contract with the Express Agency entitled a "Branch Package Receiving Agent's Agreement".

23. All commission agents have an account with the Express Agency's Accounting Department or district accountant, but the limited agents do not.

24. The same form, Form 95, is used for the transfer of accounts from one agent to another at all commission agencies.

25. All commission agents account generally to the Express Agency on the same forms, all of which are furnished by the Express Agency. However, exclusive commission agents are required to complete one form, Form 156, "Report of Public Relations and Sales Activities", which the joint and merchant agents, for example, are not

required to complete, and if the Express Agency furnishes the agency with a motor vehicle the exclusive commission agent is required to report to the Express Agency as to the expenses incurred in the operation of such vehicle. Limited agents, on the other hand, are not required to make any regular monthly reports to the Express Agency.

26. The commission agents are not carried on the Express Agency's pay roll but receive their compensation by deducting the amount of their express commissions from the express charges collected by them. The limited agents, on the other hand, are paid in cash by the local salaried
agent if the amount due them for the month is less
3652 than $3.00. However, if the amount due the limited
agent exceeds $3.00 for the month the agent is paid by a check from the Express Agency.

27. The method generally followed by merchant agents in remitting funds to the Express Agency is to place the money in a remittance envelope, furnished by the Express Agency and addressed to its Assistant Treasurer, and to obtain a receipt for the envelope from the messenger or trucker who serves the agency. In a few instances, where the amount of business handled is very small, the agent is permitted to send the remittance to the Express Agency by United States mail. Except in the case of campus representatives, who do not handle money, the limited agents, on the other hand, hold any charges collected until the driver picks up the shipment, at which time the driver signs a receipt and takes the shipment and the charges collected by the agent with him.

28. None of the joint railroad-express agents, merchant agents, caretaker or custodian agents, and the "other commission agents", are carried on any seniority roster of the Express Agency, and not all of the exclusive commission agent positions are subject to bid and placed on a register. When the position of exclusive commission

agent is subject to bid and placed on a register the agent who may be the only man at the agency, is carried on a seniority roster at the particular office or agency.

29. The Express Agency furnishes the exclusive commission agents with free transportation and grants them paid vacations, but it does not grant these privileges to the joint railroad-express agents, the merchant agents, the caretaker or custodian agents or the "other commission agents"; however, the joint agents, for example, are granted free transportation by their railroad employer.

30. The Express Agency does not report its commission agents to the Interstate Commerce Commission as employees.

31. The joint agents and the merchant agents usually render their services in small communities where the ex-
press business is limited in volume. In some in-
3653 stances, however, the merchant agents handle a con-
siderable volume of express business, and their ex-
press commissions sometimes exceed those of some ex-
clusive commission agents.

32. Of the Express Agency's 20,159 offices throughout the United States, in 1936, 16,769 were said to be offices where the station agents were joint agents, and 1,716 were said to be offices where some of the agents were exclusive agents and some were merchant agents.

33. Of the 1,469 agents referred to as merchant agents in the Express Agency's Exhibits 2-A and 4-A (1938 proceedings), 734 were merchant or storekeepers, 56 were farmers, 53 were housewives, 92 were postmasters or postmistresses, 117 were in the trucking, drayage, bus or taxi business, 62 operated automobile agencies, service stations, garages and repair shops, and the remainder were engaged in occupations such as clerk, packing concern employee, coal company employee, store employee, hotel employee, teacher, priest, student, insurance salesman,

mail carrier, undertaker, painter and blacksmith. Although the Express Agency, in defining merchant agents during the 1948 proceedings, stated that some of them were "corporations or partnerships" it identified only individuals as the express agents serving at the various localities listed as merchant agencies in Exhibits XXXIABC.

34. The express service rendered at the merchant agencies is generally performed during normal or customary business hours, but train schedules may require the performance of express work outside these hours.

35. The merchant agents, as well as, for example, some joint agents and some exclusive commission agents, do not devote their full working time to the express service and both the merchant agents and the joint agents may absent themselves from the office without consulting the Express Agency.

36. Both the Express Agency and the merchant agents are free to terminate the relationship at any time. Similarly, the Express Agency and the joint agents, for example, are both free to terminate their relationship at any time.

3654 37. The forms, stationery and other such supplies used by the various agents in operating their agencies are furnished by the Express Agency.

38. The Express Agency often furnished much of the actual equipment used in handling express at the merchant agencies, excluding, of course, the vehicles used in performing pickup and delivery work at the agencies where such work is performed. The equipment furnished by the Express Agency varies from agency to agency but may include such items as platform scales, counter scales, safe, platform trucks, desk, chair, stationery cases, chest of drawers, metal stamp and revolver; in cases where the Express Agency furnishes scales and trucks it maintains and replaces them at its own expense.

39. In addition to generally receiving copies of t
Express Agency's "General Rules and Instructions", a
its "General Accounting Instructions for Commissi
Offices", as well as various circulars and bulletins relati
to their express service, merchant agents are also instr
ted as to the work to be performed at the time they becor
express agents.

40. Although the merchant agents may have a lar
cash investment in the business interests which they m
have in addition to their express work, they apparently ha
comparatively little, if any, actual cash investment in t
express service as such.

41. The merchant agents, like the joint agents for e
ample, do not always personally perform all of the e
press work which is performed at their agencies, a
3655 they often arrange for other individuals, includi
relatives, to perform, or assist them in performin
such work. These individuals are selected and paid
the agents.

42. The express work performed by the individu
referred to in this report as joint railroad-express agen
merchant agents, caretaker or custodian agents, "oth
commission agents", and fixed allowance agents, and
the individuals engaged by such agents to perform, or
assist in performing, work at the express office, or the ra
road station, as the case may be, including the pickup a
delivery work performed by such agents and assistants
vehicles owned by the agent, other than any pickup and d
livery work performed as a part of a general drayage bu
ness, has been rendered subject to the continuing author
of the Express Agency to supervise and direct the mann
of its rendition.[26]

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[26] No finding is made, and no opinion is expressed,
garding the creditability of pick-up and delivery serv
performed as a part of a general drayage business.

43. The work performed by the limited agents, and by their assistants, has not been performed subject to the continuing authority of the Express Agency to supervise and direct the manner of its rendition.

3656

Conclusions of Law.

Applying the established principles of law to the facts in this case, it is concluded that:

1. The individuals referred to in this report as joint railroad-express agents, merchant agents, caretaker or custodian agents, "other commission agents", and fixed allowance agents, and the individuals engaged by them to perform, or to assist in performing work at the express office or the railroad station, as the case may be, including their pickup and delivery work in vehicles owned by the agents, are and have been at all times employees of the Express Agency with respect to their express work, within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts, except that no opinion is expressed with respect to the creditability of any pickup and delivery service performed at any express office as a part of a general drayage business conducted by the agent or his assistant.

2. The limited agents, and their assistants, are not and have not been employees of the Express Agency with respect to such work within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts.

3. The Railway Express Agency, Incorporated, is not entitled to a refund of contributions, under the Railroad Unemployment Insurance Act, based on the compensation of the individuals referred to in Conclusion of Law No. 1 above, but it was entitled to a refund of contributions, under the Act, on the compensation of the individuals referred to in Conclusion No. 2, credit for which has already been taken by the Express Agency.

Recommendations.

1. It is recommended that the above findings of fact and conclusions of law be adopted.

3657

Discussion.

Part I: *Statutory Provisions*

1. *Railroad Retirement Legislation*

a. The 1934 Act

Section 1(b) of the Act provided, in pertinent part, that:

> "The term 'employee' means each person in the service of a carrier, subject to its continuing authority to supervise and direct the manner of rendition of his service * * *".

b. The 1935 Act

Section 1(b) of the Act provided, in pertinent part, that:[27]

> "The term 'employee' means any person * * * in the service of a carrier".

Section 1(c) of the Act provided that:[28]

> "A person shall be deemed to be in the service of a carrier whenever he may be subject to its continuing authority to supervise and direct the manner of rendition of his service, for which service he receives compensation."

Section 1(g) of the Act provided, in pertinent part, that:[29]

> "The term 'compensation' means any form of money remuneration for service, received

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[27] Similar language was contained in Section 1(h) of the Carriers Taxing Act of 1935.

[28] Identical language was contained in Section 1(c) of the Carriers Taxing Act of 1935.

[29] Similar language was contained in Section 1(d) of the Carriers Taxing Act of 1935.

by an employee from a carrier, including salaries and commissions, * * *".[30]

3658 c. The 1937 Act

Section 1(b) of the Act provided in part as follows:[31]

"The term 'employee' means (1) any in-

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30. At the hearings in July, 1935, on S. 3151, the companion bill to H. 8651 (which became, after some amendments, the Railroad Retirement Act of 1935), Mr. Krauthoff, counsel for the Railway Labor Executives, the proponents of the legislation, stated that:

> "We have added to the bill a provision that the word 'compensation' that an employee receives will include any form of money or remuneration for active service received from a carrier, including salaries and commissions.
>
> "It appears that at the smaller stations in the country a man working for a railroad company receives commissions from the telegraph company or the express company, and that is added to his compensation in figuring his annuity." (Hearings on S. 3151 before a subcommittee of the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., p. 14.)

At page 21 of the same hearings (quoting from a memorandum apparently prepared by Mr. Krauthoff and entitled "The Railroad Retirement Problem—Memorandum Submitted with Respect to S. 3150 and S. 3151, also H. R. 8651 and H. R. 8652", it is stated:

> "Under the Act of 1935, the term 'compensation' is defined to include 'any form of money remuneration for active service, received by an employee from a carrier, including salaries and commissions.' Some employees are in the employ of two or more carriers, receiving a salary from one and commissions from another."

(The definition of "compensation" contained in S. 3151 and H. 8651, as amended, was the same as that contained in the Railroad Retirement Act of 1935 as enacted by Congress, and was similar to that contained in Section 1(d) of the Carriers Taxing Act of 1935 (Public No. 400).)

31. Substantially the same language was contained in Section 1(b) of the Carriers Taxing Act of 1937.

> dividual in the service of one or more employers for compensation * * *".[32]

The phrase "in the service of" was defined in Section 1(c) of the Act as follows:

> "An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation * * *".[33]

3659 Section 1(h) of the Act defined the term "compensation" as follows:[34]

> "The term 'compensation' means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. Such

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[32] In reporting out H. R. 7519, which became the Railroad Retirement Act of 1937, the House Committee on Interstate and Foreign Commerce stated at pages 2-3 (House Report No. 1069, 75th Cong., 1st. Sess.):

> "The bill includes as 'employees' all who may be in the service of any person defined as an employer or who may be in the employment relation to any such person. The term 'employee' also includes any officer or official representative of an organization of employees, other than a labor organization, included in the term 'employer', as defined in Section 1(a), who shall have been in the service of such employer and who shall have been duly authorized and designated to represent employees, in accordance with the Railway Labor Act, as amended."

[33] An identical provision was contained in Section 1(d) of the Carriers Taxing Act of 1937.

[34] Substantially the same language was contained in Section 1(e) of the Carriers Taxing Act of 1937.

> term does not include tips, or the voluntary payment by an employer, without deduction from the remuneration of the employee, of any tax now or hereafter imposed with respect to the compensation of such employee."[35]

d. The 1946 Amendments

Effective July 31, 1946, Section 1(e) of the Railroad Retirement Act of 1937 was amended to read in part as follows:[36]

> "An individual is in the service of an employer whether his service is rendered within or without the United States if (i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and (ii) he renders such service for compensation".[37]

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[35] There were no hearings on H. R. 7519 which became the Railroad Retirement Act of 1937. However, in speaking of a similar definition of "compensation" contained in S. 2395, as reported by the Senate Committee on Interstate Commerce, the Committee stated that part of the existing definition of "compensation" contained in the 1935 Act was omitted "as superfluous and productive of confusion." (Senate Report No. 697, 75th Cong., 1st Sess., p. 8.)

[36] The above-quoted provisions of Section 1(e), as amended, are substantially identical with the provisions of Sections 3231(d) of the Internal Revenue Code of 1954, and Section 1(e) of the Railroad Unemployment Insurance Act, as amended.

[37] In *Reynolds v. Northern Pac. Ry. Co.*, 168 F. (2d) 934 (C. A. 8, 1948), *cert. den. sub nom. Railway Employes Department of the American Federation of Labor v. Northern Pacific Railway Company*, 335 U. S. 828 (1948), the

3660 2. Railroad Unemployment Insurance Legislation[38]

a. The 1938 Act

Section 1(d) of the Act provided in pertinent part that:

> "The term 'employee' * * * means any individual who is or has been (1) in the service of one or more employers for compensation * * *".

Court considered the effect of the 1946 amendments to the Internal Revenue Code, relating to services performed on property used in an employer's operations, and integrated into such operations, and stated, at page 940, that:

> "Congress did not * * * make the amendment as a clarification of its previous definition, but only as an extension of the scope of the Act for future application."

Again in *Kelm v. Chicago, St. P. M. & O. Ry. Co.*, 206 F. (2d) 831 (C. A. 8, 1953), the Court in considering the same amendment, referred to proposals to amend the "employer" definition to include contractors as "employers", which proposals were rejected by Congress, and stated, at page 835:

> "Apparently the proponents of the amendment, in order to avoid the anomalous situation of making an 'employer' out of an individual contractor who had no employees and who himself did all the work contracted for, proposed to make him an 'employee', instead of an 'employer', under the Act. Therefore it appears that the amendment in suit was not intended to relate to independent contractors such as the Shipley Company and its employees, but only to a self-employed individual who was rendering service to a railroad under contract."

[38] House Report No. 2668 on H.R. 10127 (the Railroad Unemployment Insurance Act of 1938), 75th Cong., 3d Sess., p. 1:

> "The bill provides for a system of unemployment insurance for the same employees as are covered by the Railroad Retirement Act of 1937 * * *".

Likewise, Mr. Hay, counsel for the Committee of Railway Labor Executives' Association, proponents of the legisla-

That Section also provided that:

> “An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation.”

Section 1(f) of the 1938 Act provided that:

> “The term ‘part-time worker’ means any employee whose contract of hire (i) provides
> 3661 for regular employment for less than the normal number of hours per day, or less than the normal number of days per month, or both, prevailing for the class of service which he renders to one or more employers, and (ii) does not provide that he shall be continuously subject to call for service for the normal number of hours per day and the normal number of days per month prevailing for the class of service which he renders.”[39]

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tion, in testifying at the hearing on H.R. 10127, stated at pages 29-30:

> “In the first place we provide that the coverage of this Act shall be identical with the coverage of the Railroad Retirement Act; that is to say, it applies, speaking briefly and in summary, only to men who in some capacity or other are engaged in the operation of the country's railroad system.”

[39] House Report No. 2668 on H.R. 10127 (1938 Act), 75th Cong., 3d Sess., p. 3.

> “Special treatment is provided * * * for employees who contract that they shall work for less than normal time and shall not be subject to call for normal time. These employees are defined in subsection (f) as ‘part-time workers’. Typical employees in this category are special pay roll clerks, who are employed twice a month for 2 or 3 days, and station caretakers and attendants employed 2 or 3 hours a day. It was deemed inadvisable to extend to such employees the same full benefits extended to other employees.”

Section 1(i) of the Act provided in pertinent part that:

> "The term 'compensation' means any form of money, remuneration, including pay for time lost but excluding tips, payable for service rendered as an employee to one or more employers * * *".[40]

Section 1(j) provides that:

> "The term 'remuneration' means pay for services for hire, including pay for time lost, and tips * * *".

b. The 1939 Act

Section 1(f) of the 1938 Act relating to part-time workers was repealed by the 1939 Act. In discussing this change in the Act the House Committee on Interstate and Foreign Commerce in House Report No. 686 on H.R. 5474 (The Railroad Unemployment Insurance Act of 1939), 76th Cong., 1st Sess., states at pages 3-4:

> "Section 3 strikes out the definition of 'part-time worker' and Sections 6, 7, and 8 repeal the provisions for special treatment of 3662 such workers. The present provision defines 'part-time workers' rather narrowly. There are only a few who are known to fall within the provision, and there would be considerable difficulty in determining who are and who are not part-time workers. Moreover, most of those who fall within the restrictive category will not have sufficient earnings in covered employment to qualify for benefits, and many of them are engaged primarily in other occupations without material risk of unemployment. The complexity added to the

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[40] House Report No. 2668 on H.R. 10127 (1938 Act), 75th Cong., 3d Sess., p. 3.

"The items included in and excluded from 'compensation' (subsec. (i)) are the same as in the Railroad Retirement Act and the Carriers' Taxing Act".

administration and to an understanding of the Act would be grossly disproportionate to the result obtained. With the amendment, all employees, part-time or otherwise, will be entitled to benefits on the same basis."[41]

Part II: Regulations (20 C.F.R., Chapter 2)

"Section 201.1 Words and phrases. For the purposes of the regulations in this chapter, except where the language or context indicates otherwise:

* * * * *

"(c) Employee. The term 'employee' means an employee as defined in the act and Part 203 of this chapter."[42] (20 C.F.R. §201.1 (c)).

"Section 203.2 General definition of employee. An individual shall be an employee whenever (a) he is engaged in performing compensated service for an employer or (b) he is in an employment relation to an employer, or (c) he is an employee representative, or (d) he is an officer of an employer." (20 C.F.R. §203.2)

"Section 203.3. When an individual is performing service for an employer. (a) The legal relationship of employer and employee is defined by the act. Thus, an individual is performing service for an employer if:

"(1) He is subject to the right of an employer, directly or through another, to supervise and direct the manner in which his services are rendered; or

"(2) In rendering professional or technical services he is integrated into the staff of the employer; or

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[41] A similar statement is contained in Senate Report No. 325 on S. 2017 (the companion bill to H.R. 5474), 76th Cong., 1st Sess., p. 4.

[42] The statutory provisions relating to employee status are contained in Section 203.1 of the Regulations (20 C.F.R. §203.1).

"(3) He is rendering personal services on the property used in the operations of the employer and the services are integrated into those operations.

"(b) The provisions in paragraph (a) of this section are controlling irrespective of whether the service is performed on a part-time basis, and, with respect to paragraph (a)(1) of this section,
3663 irrespective of whether the right to supervise and direct is exercised."[43] (20 C.F.R. §203.2)

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[43] Similar provisions are found in the Regulations issued by the Bureau of Internal Revenue under the Railroad Retirement Tax Act (26 C.F.R.). These Regulations provide, in pertinent part, as follows:

> "§411.203. Who are employees—(a) In general. Within the meaning of the act, any individual is an employee if he is in the service of one or more employers (as defined in section 1532(a)) for compensation. An individual is in the service of an employer, with respect to services rendered for compensation, if:
>
> "(1) He is subject to the continuing authority of the employer to supervise and direct the manner in which he renders such services; or
>
> "(2) He is rendering professional or technical services and is integrated into the staff of the employer; or
>
> "(3) He is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations.
>
> "(i) In order that an individual may be in the service of an employer within the meaning of subparagraph (1) of this paragraph, it is not necessary that the employer actually direct or control the manner in which the services are rendered; it is sufficient if the employer has the right to do so. The right of an employer to discharge an individual is also an important factor indicating that the individual is subject to the continuing authority of the employer to supervise and direct the manner of rendition of the

3664 "Section 203.6. *Age, citizenship and other factors.* The age, citizenship or residence of an individual, or *his designation as other than an 'employee' shall not be controlling* in determining whether or not such individual is an employee within the meaning of the act, * * *". (20 C. F. R. §203.6) (Emphasis supplied)

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services. Other factors indicating that an individual is subject to the continuing authority of the employer to supervise and direct the manner of rendition of the services are the furnishing of tools and the furnishing of a place to work by the employer to the individual who renders the services.

"(ii) In general, if an individual is subject to the control or direction of an employer merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not, as to such services, in the service of an employer within the meaning of subparagraph (1) of this paragraph. However, an individual performing services as an independent contractor may be as to such services, in the service of an employer within the meaning of subparagraphs (2) or (3) of this paragraph.

"(iii) Whether or not an individual is an employee will be determined upon an examination of the particular facts of the case.

"(iv) If an individual is an employee, it is of no consequence that he is designated as a partner, coadventurer, agent, independent contractor, or otherwise, or that he performs services on a part-time basis. The age of the individual, or the measurement, method, or designation of the remuneration, is immaterial, if he is in fact an employee.

"(v) The act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the act. An officer of an employer is an employee, but a director as such is not. A director may be an employee, however, if he performs services other than those required by attendance at and participation in meetings of the board of directors."

Part III: Employee Coverage Under the Railroad Retirement and Railroad Unemployment Insurance Acts.

It is apparent from the statutory provisions contained in the Railroad Retirement and Railroad Unemployment Insurance Acts (hereinafter sometimes referred to as the Acts), and from their legislative history, that employee status determinations under such Acts depend not upon the application of common law principles,[44] but upon the

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[44] There are no uniformly accepted common law rules which courts everywhere use to define the term "employee". As was stated in a recent article by Joseph M. Jacobs, Esq., entitled "Are 'Independent Contractors' Really Independent", appearing in the May, 1954, issue of the Labor Law Journal, page 347:

> "There are literally thousands of decisions issued by American and English courts revealing an infinite number of varying and inconsistent applications of the tests designed to determine whether or not an individual is an employee. There have been few legislative concepts which have been applied more varyingly or inconsistently."

The Restatement of the Law of Agency, Vol. 1, ch. 7, §220, recognizes the lack of uniformity in the so-called common law rules when it states, at page 484, "The relationship of master and servant is one not capable of exact definition." Although a number of the factors, which, among others, have been considered by the courts in determining whether in a given situation an individual is or is not an employee, are set forth at page 483 of the Restatement, it is also stated at page 484, with respect to the master-servant relationship, that "it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relationship." The factors referred to on page 483 of the Restatement are:

> "(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> "(b) whether or not the one employed is engaged in a distinct occupation or business;
> "(c) the kind of occupation, with reference to whether,

definite statutory tests set forth in the Acts. Although one of these tests, which provides that an individual is "in the service of" an employer if he is "subject 3665 to the continuing authority of the employer to supervise and direct the manner of rendition of his service", does not differ substantially from the common law stated in many of the cases,[45] it is nevertheless in substitution there-

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> in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> "(d) the skill required in the particular occupation;
>
> "(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> "(f) the length of time for which the person is employed;
>
> "(g) the method of payment, whether by the time or by the job;
>
> "(h) whether or not the work is a part of the regular business of the employer; and
>
> "(i) whether or not the parties believe they are creating the relation of master and servant."

As indicated above, however, the courts have not agreed upon any uniform set of common law principles governing the master-servant relationship. For example, compare the principles considered by the courts in *Cimerelli* v. *New York Cent. R. Co.*, 148 F. (2d) 575, 577 (C. A. 6, 1945); *Party Cab Co.* v. *United States of America*, 172 F. (2d) 87, 92 (C. A. 7, 1949) (the long quotation including a number of case citations appearing at pages 52-53 of the Express Agency's main brief, which the Express Agency indicates at page 52 of the brief was taken from Judge Major's decision in the Party Cab case, cannot be found in the reported discussion of the case), and *Matcovich* v. *Anglim*, 134 F. (2d) 834, 837 (C. A. 9, 1943).

[45] For example, there is no substantial difference between the statutory provision quoted above, and the Express Agency's statement, at page 50 of its main brief, that "Under the common law, the employer need have only the 'right' to direct the manner in which the business shall be done."

for. In this connection, it may be pointed out that the Railroad Retirement and Railroad Unemployment Insurance Acts were enacted pursuant to a public policy unknown to the common law and their applicability must be judged from the purposes which Congress had in mind,
rather than from the common law rules worked out
3666 in regard to the determination of tort liability.[46] As
the Board said in its brief in opposition to a petition

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[46] See *Board* v. *Hearst Publications*, 322 U. S. 111 (1944), rehearing denied 322 U. S. 769; *Grace* v. *Magruder*, 148 F. (2d) 679 (C. A., D. C., 1945), cert. den., 326 U. S. 720 (1945); *Schwing* v. *United States*, 165 F. (2d) 518 (C. A. 3, 1948); *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. (2d) 633 (C. A. 4, 1949), cert. den., 338 U. S. 900 (1949); *United States* v. *Vogue, Inc.*, 145 F. (2d) 609 (C. A. 4, 1944); *Walling* v. *American Needlecrafts*, 139 F. (2d) 60 (C. A. 6, 1943); *Walling* v. *Woodbine Coal Co.*, 64 F. Supp. 82 (E. D., Ky., 1945); *Walling* v. *Merchants Police Service*, 59 F. Supp. 873 (W. D., Ky., 1945); and *Stone* v. *United States*, 55 F. Supp. 230 (E. D. Penn., 1943). Furthermore, while they, of course, do not control the applicability of Federal Statutes, it is noted that a number of state courts have also recognized the fact that the common law concepts of master and servant do not necessarily apply to social legislation of this type. See for example, *Industrial Commission* v. *Northwestern Mut. L. Ins. Co.*, 88 P. (2d) 560 (Colo., 1939); *Rozran* v. *Durkin*, 45 N. E. (2d) 180 (Ill., 1942); *A. George Miller, Inc.* v. *Murphy*, 42 N. E. (2d) 78 (Ill. 1942); *Unemployment Compensation Com'n.* v. *Nat. Life Ins. Co.*, 14 S. E. (2d) 689 (N. C., 1941); *Unemployment Comp. Com'n* v. *Jefferson S. L. Ins. Co.*, 2 S. E. (2d) 584 (N. C., 1939); *Singer Sewing Mach. Co.* v. *State U. Comp. Commission*, 103 P. (2d) 708 (Oregon, 1940), affirmed on rehearing, 116 P. (2d) 744 (1941); *Singer Sewing Mach. Co.* v. *Industrial Commission, etc.*, 134 P. (2d) 479 (Utah, 1943), rehearing denied, 141 P. (2d) 694 (1943); *Creameries of America* v. *Industrial Commission*, 102 P. (2d) 300 (Utah, 1940); *State* v. *Superior Court for Thurston County*, 157 P. (2d) 938 (Wash., 1945); *Mulhausen* v. *Bates*, 114 P. (2d) 995 (Wash., 1941), and *McDermott* v. *State*, 82 P. 568 (Wash., 1938).

for a writ of certiorari in *Utah Copper Co.* v. *Railroad Retirement Board,* 129 F. 2d 358 (C. A. 10, 1942) (cert. den. 317 U. S. 687 (1942)), pp. 6-7:

> "Congress, in framing the Railroad Retirement Act, was concerned with describing objectively those persons who for railroad retirement purposes should be considered in railroad service, not with giving precision to common law or other conceptions of a servant."[47]

3667 Similarly, in *Board* v. *Hearst Publications,* 322 U. S. 111 (1944), rehearing denied 322 U. S. 769, the Supreme Court of the United states, in passing on the status, under the National Labor Relations Act, of certain newsboys employed by the Hearst Publications, rejected the

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[47] In the Utah Cooper case the Company had urged, as one of its reasons why the Supreme Court should grant a writ of certiorari, that the decision of the Court of Appeals for the Tenth Circuit holding certain individuals to be "employees" within the meaning of the Railroad Retirement Act conflicted with other decisions of the Court and with the decisions of other courts of appeal. In its brief in opposition to the petition for a writ of certiorari the Board said, at p. 9:

> "The decisions asserted to conflict with the decision of the court below involved the scope of the employer-employee relationship under common law or various statutory standards other than those prescribed by the Railroad Retirement Acts. In view of the special definition of that relationship in the Railroad Retirement Acts and the general statutory policies for which it is made significant under those Acts, the norms of tort liability—either statutory or common law—are of questionable relevance."

In this connection it may be noted that in a number of the cases, mentioned by the Express Agency at pages 52-53 and 62 of its main brief, the Courts were concerned with the norms of tort liability, and that these cases involved the scope of the employer-employee relationship under common law or various statutory standards other than those prescribed by the Railroad Retirement and Railroad Unemployment Insurance Acts.

common law rules of master and servant as a basis for
termining the coverage of the Act. The Court said, at p
120-122:

> "The argument assumes that there is some simp
> uniform and easily applicable test which the cou
> have used, in dealing with such problems, to determi
> whether persons doing work for others fall in o
> class or the other. Unfortunately this is not true. O
> by a long and tortuous history was the simple formul
> tion worked out which has been stated most frequent
> as 'the test' for deciding whether one who hires a
> other is responsible in tort for his wrongdoing. B
> this formula has been by no means exclusively contr
> ling in the solution of other problems. And its si
> plicity has been illusory because it is more large
> simplicity of formulation than of application. Fe
> problems in the law have given greater variety
> application and conflict in results than the cases ari
> ing in the borderland between what is clearly an e
> ployer-employee relationship and what is clearly o
> of independent, entre-preneurial dealing. This is tr
> within the limited field of determining vicario
> liability in tort. It becomes more so when the field
> expanded to include all of the possible applicatio
> of the distinction.
>
> "It is hardly necessary to stress particular instanc
> of these variations or to emphasize that they hav
> arisen principally, first, in the struggle of the courts
> work out common-law liabilities where the legislatur
> has given no guides for judgment, more recently al
> under statutes which have posed the same proble
> for solution in the light of the enactment's particul
> terms and purposes. It is enough to point out tha
> with reference to an identical problem, results ma
> be contrary over a very considerable region of doubt i
> applying the distinction, depending upon the state o
> jurisdiction where the determination is made; and tha
> within a single jurisdiction a person who, for instanc
> is held to be an 'independent contractor' for the pur
> pose of imposing vicarious liability in tort may b

> an 'employee' for the purposes of particular legislation, such as unemployment compensation. See, e.g. *Globe Grain & Milling Co. v. Industrial Comm'n.*, 98 Utah 36, 91 P. (2d) 512. In short, the assumed simplicity and uniformity, resulting from application of 'common-law standards', does not exist."

In the course of its opinion the Supreme Court pointed out that the National Labor Relations Act was "* * * federal legislation, administered by a national agency, intended to solve a national problem on a national
3668 scale",[48] and it discussed further the lack of uniformity which would arise in the application of the Act

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[48] Similarly, the Railroad Retirement and Railroad Unemployment Insurance Acts are Federal legislation, administered by a national agency, and intended to solve a national problem on a national scale. Thus, in House Report No. 2668 on H. R. 10127 (the Railroad Unemployment Insurance Act of 1938), 75th Cong., 3d Sess., pp. 1-2, it is stated that:

> "Especially with regard to relations of management and labor, Congress has long recognized that a number of problems peculiar to the railroad industry necessitate separate treatment of that industry in various aspects, rather than subjecting it to other Federal legislation applicable to industries generally or leaving it subject to varied State laws, and to meet that necessity has enacted such legislation as the Railway Labor Act, the Employers' Liability Act and the Railroad Retirement Acts. For similar reasons, the inclusion of the railroad industry under the various State unemployment insurance acts and titles III and IX of the Social Security Act results in needless inequalities and inequities to the employers and employees. Unemployment insurance for railroad workers is especially not susceptible of treatment by numerous State plans, since a large proportion of railroad workers perform their services in more than one State and find it extremely difficult satisfactorily to adjust their rights under the somewhat varied State plans. The employers are also confronted with the problem of

if the varying doctrines of the law of master and servant in the various states were sought to be applied in the administration of the Act, and the confusion which would arise from importing into such administration the complicated rules of the common law generally.[49] The Supreme Court thereupon concluded that "The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal
3669 distinctions separating them from 'independent contractors' ", and that the true test was to be found in

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keeping records and making reports under the divergent requirements of the State acts. The bill provides for a system of unemployment insurance designed to meet the particular needs of the industry, and in so doing avoids many of the intricacies and complexities of existing State plans."

[49] Such a "lack of uniformity" and "confusion" may well be the result of the passage of the joint resolution by Congress (62 Stat. 438) stating that it was the intent of Congress that common-law rules should be used in determining whether an individual is an "employee" for the purposes of the Social Security Act. As the Court of Appeals for the Tenth Circuit stated in *Benson* v. *Social Security* Board, 172 F. (2d) 682 (1949), at page 685:

> "While it is not necessary to explore the full effect of this enactment in the determination of the existence of employer-employee relationships arising in the future, we think it can fairly be said that the intent of Congress was to say that in determining in a given case whether under the Social Security Act such a relationship exists, the common law elements of such a relationship, as recognized and applied by the courts generally at the time of the passage of the Act were the standard to be used. *The passage of this Act will not solve this recurring problem in future cases that will come before the Courts because, as always, the question will be—can it be said from all the facts in each case that such control is present as meets the test?"* (Emphasis supplied)

the basic purpose of the legislation.[50] In this connection the court said (322 U. S., at pp. 127-128:

> "Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it connot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation. Interruption of commerce through strikes and unrest may stem as well from labor disputes between some who, for other purposes, are technically 'independent contractors' and their employers as from disputes between persons who, for those purposes, are 'employees' and their employers. *Cf. Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91. Inequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of the one group, as of the other. The former, when acting alone, may be as 'helpless in dealing with an employer' as 'dependent * * * on his daily wage' and as 'unable to leave the employ and to resist arbitrary and unfair treatment' as the latter. For each, 'union * * * [may be] essential to give * * * opportunity to deal on equality with their employer.' And for each, collective bargaining may be appropriate and effective for the 'friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions.' 49 Stat. 449. In short, when the particular situation of employment combines these characteristics, *so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes*

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[50] See also *National Labor Relations Board* v. *Armour & Co.*, 154 F. (2d) 570 (C. A. 10, 1945), cert. den. 329 U. S. 732 (1946).

> *unrelated to the statute's objectives and bring the relation within its protections.*" (Emphasis supplied.)[51]

3670 In *United States* v. *Silk*, 331 U. S. 704 (1947),[52] the Supreme Court held that the rule laid down in the Hearst case was also applicable to employee status determinations under the Social Security Act.[53] After pointing out that the Social Security Act of 1935 was the result of long consideration by the President and Congress of the evil of the burdens resting upon large numbers of the people because of the insecurities of modern life, particularly old age and unemployment, the Court stated (331 U. S., at pp. 712-713):

> "As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate

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[51] See also *Walling* v. *American Needlecrafts, supra* (139 F. (2d) at p. 63), where the Court of Appeals for the Sixth Circuit, in referring to the Fair Labor Standards Act, stated that:

> "If the Act presently considered, expressly or by necessary implication, brings within the scope of its remedial and regulatory provisions, workers in the status here involved, we are not concerned with the question whether a master-servant relationship exists under otherwise applicable rules of the common law."

[52] This case and Harrison, Collector of Internal Revenue *vs.* Greyvan Lines, Inc., were decided together in the same opinion on the same date, and the case has sometimes been referred to as United States *vs.* Greyvan, or Harrison *vs.* Greyvan.

[53] The Social Security Act, unlike the Railroad Retirement and Railroad Unemployment Insurance Acts, did not specifically define the term "employee". See *Social Security Board* v. *Nierotko*, 327 U. S. 358, 363 (1946).

> burdens at the expense of the benefits sought by the legislation. These considerations have heretofore guided our construction of the Act. *Buckstaff Bath House Co.* v. *McKinley*, 308 U. S. 358; *Social Security Board* v. *Nierotko*, 327 U. S. 358.
>
> "Of course, this does not mean that all who render service to an industry are employees. Compare *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520. Obviously the private contractor who undertakes to build at a fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees. The distributor who undertakes to market at his own risk the product of another, or the producer who agrees so to manufacture for another, ordinarily cannot be said to have the employer-employee relationship. Production and distribution are different segments of business. The purposes of the legislation are not frustrated because the Government collects employment taxes from the distributor instead of the producer or the other way around."

Subsequent to the decisions in the Silk and Greyvan cases, Congress adopted a joint resolution (62 Stat. 3671 438), stating that it was the intent of Congress that common law rules should be used in determining whether an individual is an "employee" for the purposes of the Social Security Act.[54] It must be noted in this connection, however, that although the Railroad Retirement and Railroad Unemployment Insurance Acts have been amended a number of times, including, in 1946, amendments to the employee definition contained in such Acts, Congress has never seen fit to pass any legislation specifying that the common law rules should be followed in making employee status determinations under the Railroad Retirement and Railroad Unemployment Insurance Acts.[55]

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[54] Although the joint resolution was to be considered effective as of the date of the enactment of the Social Security Act (August 14, 1935), it was specifically provided in the resolution that it would not void (1) any wage credits reported to the Bureau of Internal Revenue with respect to services performed prior to the enactment of the resolution, or (2) any wage credits with respect to services performed prior to the close of the first calendar quarter which begins after the enactment of the resolution in the case of individuals who had attained age sixty-five or who had died, prior to the close of such quarter, and with respect to whom prior to the enactment of the resolution wage credits were established which would not have been

In connection with a consideration of the employee status test contained in our Acts, it is significant to note that, although not involved in this case, the employer coverage provisions of both Acts (Section 1(a)) were designed to keep within the coverage of the Acts, operations and services intimately and integrally related to railroad transportation, even though there might be arrangements,
contractual or otherwise, whereby such operations
3672 and services would be conducted by entities separate
from "carriers" but effectively controlled by "car-

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established if the amendment made by the resolution had been in effect on and after August 14, 1935. As the Court said in *Ewing* v. *Vaughn*, 169 F. (2d) 837 (C. A. 4, 1948), at page 840:

> "The amendment is retroactive and thus makes non-employees of persons who have been held by the Administration for many years to have been employees. Then the statute says that this retroactivity shall not affect 'wage credits'. That is all, nothing else."

[55] For example, more than fifteen years has elapsed since the Board's decision of August 1, 1939, holding joint railroad-express agents and merchant agents to be employees within the meaning of the Railroad Retirement Act. During that period Congress had been in session many times, and has amended the Railroad Retirement and Railroad Unemployment Insurance Acts on a number of different occasions, without attempting to change the employee status definition contained in these Acts so as to exclude joint or merchant agents from their coverage.

riers".[56] Such a plan is evidenced not only by the broad and unrestricted use of the term "control",[57] as contained in Section 1(a) of the Acts, but also by the report of the Senate Committee on Interstate Commerce on S. 2395,[58] Senate Report No. 697, 75th Cong., 1st Sess. (1937), p. 7, in which it is stated:

> "Contractors, other than those which perform casual service, would not be excluded, irrespective of whether control be legal or de facto. De-facto control may be exercised not only by direct ownership of stock, but by means of agreements, licenses, and other devices

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56. Thus, in *Railroad Board* v. *Duquesne Co.*, 326 U. S. 446 (1946), where a railroad controlled company performed such services, the Supreme Court said at page 454:

> "In other words if a service is involved which the railroad could perform as a part of its transportation service, it is within the present Acts."

57. Cf. *Rochester Telephone Corporation* v. *United States*, 23 F. Supp. 634 (W. D. N. Y., 1938) and the affirming opinion, 307 U. S. 125. In determining the application of the control provisions of the Communications Act of 1934, the three judge district court stated (23 F. Supp., p. 636):

> "Broadly used, 'control' may embrace every form of control, actual or legal, direct or indirect, negative or affirmative."

And as stated by the Supreme Court in that case (307 U. S., at p. 145):

> "Investing the [Federal Communications] Commission with the duty of ascertaining 'control' of one Company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case."

58. S. 2395 was favorably reported to the Senate, with amendments, by the Senate Committee on Interstate Commerce, June 10, 1937. It was debated in the Senate, and indefinitely postponed, on June 23, 1937, H. R. 7519 being passed in lieu thereof. Section 1(a) of S. 2395, as amended by the Committee and reported by it to the Senate was substantially the same as Section 1(a) of H. R. 7519 (the Railroad Retirement Act of 1937).

> which insure that the operation of the company is conducted in the interests of the carrier.
>
> "* * * there are brought within the scope of the act substantially all those organizations which are 3673 intimately related to the transportation of passengers or property by railroad in the United States."[59]

It is reasonable to conclude from the foregoing that Congress, in the enactment of social legislation, such as the Railroad Retirement and Railroad Unemployment Insurance Acts, for railroad workers, intended to extend its benefits to all individuals actually engaged in railroad work, and subject to the "employer's" right to supervise and direct the manner of performance of such work, irrespective of whether the "employer" designates them as "employees" or as "contractors". Moreover, it is not surprising, in view of the long history of special legislation for the railroad industry, that many railroads have at one time or another adopted the device of entrusting railroad work to alleged "contractors" in an effort to thereby evade or limit the scope of federal regulation of the industry. This practice was especially prevalent during the effective period of the Transportation Act of 1920, and was vigorously condemned by the United States Railroad Labor Board. See the following statement from *Railway Employees' Department A. F. of L. v. Indiana Harbor Belt Railroad Company*, 3 U. S. R. L. B. 332, 337:

> "The object of the transportation act was to prevent interruption to traffic, growing out of disputes between carriers and their employees. Such controversies had for years periodically harassed the public,

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59. Substantially the same statement with respect to carrier-control provisions in the Carriers' Taxing Act of 1937 is made in the report of the House Committee on Ways and Means on H. R. 7589 (H. Rep. 1071, 75th Cong., 1st Sess. (1937), p. 5), and in the report of the Senate Committee on Finance on H. R. 7589 (Sen. Rep. 818, 75th Cong., 1st Sess. (1937), p. 4).

blocked commerce, stagnated business, destroyed property values, and visited great inconvenience and suffering upon millions of people. At a time when our country was in no condition to undergo further repetitions of such unfortunate experiences and when they were possible on a much larger scale than ever before, Congress endeavored to provide a method for the adjustment of railway labor troubles. In the transportation act, 1920, the Government enjoins upon all carriers, and their officers, employees, and agents, the duty to 'exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier, growing out of any dispute between the carrier and the employees or subordinate officials thereof.' Elaborate provisions are made in this act for conferences between the parties for the settlement of disputes and, in the event of a failure to agree, for the hearing and decision of them by adjustment boards and by the Railroad Labor Board.

3674 "When Congress in this act speaks of railroad employees it undoubtedly contemplates those engaged in the customary work directly contributory to the operation of the railroads. It is absurd to say that carriers and their employees would not be permitted to interrupt commerce by labor controversies unless the operation of the roads was turned over to contractors, in which event the so-called contractors and the railway workers might engage in industrial warfare ad libitum."

See also *United Brotherhood of Maintenance of Way Employees and Railway Shop Laborers* v. *Erie Railroad Co.*, 3 U. S. R. L. B. 683, and *Railway Employes' Department, A. F. of L.* v. *Western Maryland Railway Co.*, 3 U. S. R. L. B. 934.

The practice of having railroad agents, and others engaged in various outside business activities, also serve as express agents has existed without substantial change for many years, and long antedated the passage of the Railroad Retirement and Railroad Unemployment Insurance Acts.[60] However, although this practice long antedated the passage of the Acts, and although there is no evidence of any attempt to circumvent or avoid liabilities imposed by the Acts, this would not prevent the Acts from being applicable to all workers in the railroad industry irrespective of whether the employer designated them as "employees" or "contractors". See *Oliver* v. *Northern Pac. Ry. Co.*, 196 Fed. 432 (E. D., Wash., 1912), involving the Federal Employers' Liability Act, wherein the court, in speaking

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60. In this connection it may be noted, however, that originally the express companies' accountants were only concerned with two general categories of express agents. Thus, in the 1948 proceeding General Auditor Gross, in referring to express operations prior to the date when the Express Agency began operation, stated, (48R, 536-537):

> "During those many years, and during the time that the express companies were making their reports to the Interstate Commerce Commission with respect to their revenues, expenses and other detailed information, there were two general categories of express agents in which the accountants for the express companies were interested—namely, those that were on a salaried basis and those that were on a commission basis. Salaried agents were paid on the payrolls of the express companies, received a stipulated sum of pay for their services, and commission agents were paid a commission generally at the rate of 10%. The rates of commission naturally varied in different parts of the country and with the different express companies. Not until the advent of the Railroad Retirement Act and the Unemployment Insurance Act was it essential for the accountants in the express service to distinguish between the various classes of commission agents to develop their relationship with the express company. Then when that became necessary, to make that distinction or differentiation, we found these many different categories of agents, some of them called joint railroad commission agents, some merchant agents, branch agents, and there various other categories to which we have referred in this matter."

of a contract between the Pullman Company and the railroad, said at p. 436:

> "The contract between these two companies was entered into long prior to the passage of the act in question and was therefore not entered into for the purpose 3675 of circumventing or avoiding liabilities imposed by law. Nevertheless, if such a contract is recognized and given the effect claimed for it by the defendant, there is nothing to prevent railway companies from avoiding obligations imposed upon them by this or other laws of Congress. It was attempted in argument to draw a distinction between those positive obligations imposed upon public service corporations by law and obligations voluntarily assumed by them for the comfort and convenience of passengers, and for their own profit. Such a distinction may, and in some cases does, exist, but it cannot be gainsaid that persons employed by railway companies in performing obligations voluntarily assumed are as much employees of the company as those servants who are discharging positive duties imposed by law. Persons employed as the deceased was come within the spirit of the Statute, and those dependent on them for support should not be denied the protection it affords."

See also *Despatch Shops v. Railroad Retirement Board*, 154 F. (2d) 417 (C. A. 2, 1946), wherein the Court, in speaking of the status, under the Railroad Retirement Act, of workers performing service in connection with the repair and construction of rolling stock, stated at page 419:

> "We may add that the history of this legislation demonstrates the need of inclusion of just such workers as are here involved if disastrous interference with transportation service such as the strike of the shop employees in 1922, is to be avoided. These and other factors show that the precedents under acts administered by the Interstate Commerce Commission for quite different objectives—rate making and avoidance of discrimination in railroad charges, rather than

provisions for annuities and other benefits to transportation workers—cannot be employed, as plaintiffs would urge, for the definitive clarification of the coverage of these Acts. We therefore agree with the Court of Appeals when it says:

> " 'If Despatch, in this situation, is not an 'employer' under the terms of the Act, it can be readily seen that the railroads would be free to take from under the Act virtually all of their workers whose employment is in the 'supporting' activities, through the simple expedient of setting up wholly owned corporate affiliates to perform these services. It is conceivable that everything from maintenance-of-way through
> 3676 engineering or bookkeeping might be done through so-called 'independent' corporations. The application of this Act and of other Acts passed for similar purposes and embodying the same language could be so severely limited as to render them of little worth in achieving the purposes for which they were passed.' "[61]

In addition to the foregoing general discussion regarding coverage under the Acts, it must be noted that Section 1(b) of the Railroad Retirement Act, and Section 1(d) of the Railroad Unemployment Insurance Act, define "employee" in broad terms,[62] as meaning "any individual"

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[61] See *Despatch Shops* v. *Railroad Retirement Board*, 153 F. (2d) 644 (C. A. D. C., 1946), which passed on a similar question under the Railroad Unemployment Insurance Act.

[62] Thus, in its opinion in Jurisdictional Docket No. 12 "*In the Matter of the status of the Union Pacific Coal Company under the Railroad Retirement and Railroad Unemployment Insurance Acts*" adopted May 31, 1940 (B. O. 40-299), the Board, in discussing the "railroad industry" coverage intended by the Acts, at page 112:

> "And that Congress conceived of the 'railroad industry' as comprehending activities integrated with railroad transportation, rather than being restricted in scope to railroad transportation proper, appears from *the unrestricted scope of 'employee' service cov-*

in the service of one or more employers for compensation.[63] Section 1(c) of the Retirement Act, and Section 1(e) of the Unemployment Insurance Act, provide that "An individual is in the service of an employer whether his service is rendered within or without the United States if (i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service", and such service is rendered for compensation. Section 203.3 of the Board's Regulations (20 C. F. R. §203.3(b)) elaborates upon this definition by providing, in substance, that it is not necessary that an employer actually direct and control the manner in which the services are per-
3677 formed; it is sufficient if the employer has the right to do so.[64] This is in accord with the common-law doctrine, followed in many of the cases, that in the determina-

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age, which simply requires compensated service to an 'employer' under the Acts, without regard to the type of activity in which the particular individual may be engaged." (Emphasis supplied)

[63] The use of the word "any" in relation to the term "employee" in the Fair Labor Standards Act is discussed in *United States* v. *Rosenwasser,* 323 U. S. 360, 362-363 (1945).

[64] A similar provision was contained in the regulations effective June 1, 1938 (3 FR 1478, 1480) and in subsequent revisions of the regulations. Although the Railroad Retirement Act of 1937 has been amended on numerous occasions it has always contained a provision that an individual is an employee of an employer if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service. In *Boehm* v. *Commissioner,* 326 U. S. 287 (1945), the Supreme Court, in speaking of certain Treasury regulations, said at pages 291-292:

> "Such regulations, being 'long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.' *Helvering* v. *Winmill,* 305 U. S. 79, 83."

tion of whether an employer-employee relationship exists, the essential question is whether the employer has the right to exercise control over the manner of rendition of the service.[65] *Singer Manufacturing Co.* v. *Rahn,* 132 U. S. 518 (1889); *McLamb* v. *E. I. DuPont DeNemours & Co.,* 79 F. (2d) 966 (C. A. 4, 1935); *Pennsylvania R. Co.* v. *Barlion,* 172 F. (2d) 710 (C. A. 6, 1949); *Eldridge* v. *McGeorge,* 99 F. (2d) 835 (C. A. 8, 1938); *Jones* v. *George F. Getty Oil Co.,* 92 F. (2d) 255 (C. A. 10, 1937); cert. den. 303 U. S. 644 (1938); *Ayers* v. *Hobby,* 123 F. Supp. 115 (D. Virginia, 1954); *McMillan* v. *Montecito Country Club,* 65 F. Supp. 240 (S. D. Calif., 1946); *Lembke* v. *Fritz,* 272 N. W. 300 Iowa, 1937), and *Bergstrom* v. *Brehmer,* 8 N. W. (2d) 328 (Minn., 1943). As indicated above it is not necessary that this right of control ever be actually exercised. *Grace* v. *Magruder,* 148 F. (2d) 679 (C. A., D. C., 1945), cert. den. 326 U. S. 720 (1945), *Cimorelli* v. *New York Cent. R. Co.,* 148 F. (2d) 575 (C. A. 6, 1945), and *Karas* v. *Klein,* 70 F. Supp. 469 (D. Minn., 1947).

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[65] It may also be noted that in some cases the Courts have held that where the duties imposed by law upon the master are nonassignable, the relationship of master and servant may exist independent of the fact in whom the immediate or ultimate power of control of the servant might reside. See *Atlantic Coast Line R. Co.* v. *Treadway's Ad'x* 93 S. E. 560 (Virginia, 1917), cert. den. 245 U. S. 670 (1917). See also *Chicago, R. I. & P. Ry. Co.* v. *Norman,* 25 P. (2d) 298 (Okla., 1933); *Brinkley* v. *Pennsylvania R. Co.,* 184 S. E. 227 (Virginia, 1936), and *Clinchfield Coal Corporation* v. *Redd,* 96 S. E. 836 (Virginia, 1918).

3678 Part IV: The Express Agents and their Assistants.

As pointed out in the introductory part, the agents representing the Express Agency at its approximately 22,000 agencies may, for the purposes of this report, be divided into one of the following four general classifications: salaried agents, commission agents, fixed allowance agents, and limited (branch) agents. With the exception of the limited (branch) agents these individuals are official representatives of the Express Agency in their respective communities. The limited agents have their agencies (actually sub-agencies) within the pickup and delivery limits of a regular salaried agent who is the official representative of the Express Agency in that community. The agencies operated by the salaried, commission and fixed allowance agents are listed in the Express Agency's Official Directory of express offices. However, the limited agencies, not being express offices, are not included in the directory.

1. Salaried Agents.

The salaried agents, sometimes referred to as "exclusive employees", are paid on a wage or salary basis from the Express Agency's regular payroll.[66] These individuals devote their entire working time to express work, and usually represent the Express Agency at the larger offices. However, the size of the community, and the volume of express work handled at the agency, do not always determine whether the express agency will be a salaried or a commission agency. For example, the United States Census Reports show that Catlettsburg, Kentucky, had a population of 5,025 in 1930, and 4,524 in 1940. In the 1937 hearings Vice President Owens of the Express Agency testifi that:

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[66] In the year 1936, the Express Agency had 20,159 agencies throughout the United States, of which 1,674 were agencies at which the agents were paid on a salary basis.

> "The express business is small at Catlettsburg and t railroad agent simply did not want to bother with and would not handle it, but it did have enough bu ness that we maintain a regular office there, therefo we have a salaried employee." (37R, 36.)

3679 In answer to a question regarding the duties of t salaried agent at Catlettsburg, Mr. Owens replie

> "His usual business, at this time of year, is usual to build a fire in the office." (37R, 52.)[67]

The Express Agency admits that the salaried agents a its employees, and the status of these agents, and the assistants, is not involved in these proceedings.

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[67]. An examination of the lists of merchant agenci introduced in the 1948 hearings discloses that a number them are located in communities having a population equ to, or larger than, Catlettsburg, Kentucky. For exampl

City	Period for which City is in Exhibit	Pop. 1940	Po 195
Lynwood, Calif.	1-1-37 to 12-31-47	10,982	25,8
Redondo Beach, Calif.	4-1-41 to 9-30-47	13,092	25,2
Silver City, New Mex.	1-1-37 to 12-31-47	5,044	7,0
Northampton, Penn.	1-1-37 to 12-31-47	9,622	9,3

(Above population figures taken from United Stat Census Reports prepared by the Bureau of the Census.)

2. Commission Agents.[68]

A. General Discussion.

The great majority of express agents are paid on a 3680 commission basis.[69] Included in this group are individuals who have been referred to in these proceedings as exclusive commission agents, joint railroad-express agents, caretaker or custodian agents and merchant agents,[70] as well as certain other commission agents not coming exactly within any of the preceding groups and who will hereinafter sometimes be referred to as "other commission agents."[71]

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[68] The terms "commission agent" and "merchant agent", as used in referring to express agents, are not to be confused with the term "commission merchants". Express commission agents, including merchant agents, are official representatives of the Express Agency engaged in work which is an integral part of the regular daily transportation service which the Express Agency, as a common carrier, offers to the general public. As stated in *Neild v. District of Columbia*, 110 F. (2d) 246, 259 (C. A. D. C., 1940), "A commission merchant, or a factor, as he is generally known to the common law, is a commercial agent to whom the possession of personal property is entrusted by or for the owner, to be sold, for a compensation, in pursuance of the agent's usual trade or business. Title to the goods remains in the principal, the factor being merely a bailee for the purposes of the agency." For similar holdings see *Ommen v. Talcott*, 188 Fed. 401 (C. A. 2, 1911); *United States v. Marienfeld*, 116 F. Supp. 634 (E. D. Mo., 1953); *McCarley v. Foster-Milburn Co.*, 93 F. Supp. 421 (W. D. N. Y., 1950); *In re Gulick*, 186 Fed. 350 (S. D. N. Y., 1911); *In re Rabenau*, 118 Fed. 471 (W. D. Mo., 1902); *Clark v. Otto B. Ashbach & Sons*, 64 N. W. (2d) 517 (Minn., 1954). As the Court of Appeals for the Second Circuit said in *Texas Co. v. Higgins*, 118 F. (2d) 636, 638 (1941), "a factor is not an 'employee' but an 'independent contractor'. Restatement of Agency §1 comment d." It is clear that express commission agents, as such, are not "commission merchants" or "factors", and that consequently such cases as *Texas Co. v. Higgins*, *supra*; *Glenn v. Standard Oil Co.*, 148 F. (2d) 51 (C. A. 6, 1945); and *Indian Refining Co. v. Dallman*, 119 F. (2d) 417 (C. A. 7, 1941), referred to at pages 60 and 62 of the Express Agency's main brief, are of questionable relevance in considering the status of express commission agents under our Acts.

[69] In 1956, the Express Agency had 18,485 agencies at which the agents were paid on either a commission or a fixed allowance basis. Of this group 16,769 were agencies

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where the agents were joint railroad-express agents, of whom 81 were compensated on a fixed allowance basis. Of the remaining 1,716 agencies, some were operated by agents paid on a commission basis, who devoted all of their time to the service of the Express Agency, and the rest were operated by agents also paid on a commission basis who were engaged in other business activities in addition to their express work. (Examiner's First Report, p. 2.)

[70] It should be noted in this connection, however, that not all of the individuals referred to as "merchant agents" are actually merchants. (See Exhibit 4A, 1938 hearings.) A good example of this is Agent Williamson, Flinstone, Georgia, who stated that she was not engaged in any gainful occupation other than that of express agent (Exhibit L-B, 1948 proceedings; 48R, 587-589).

[71] The practice of arranging with individuals engaged in some other business activities, such as a railroad agent, a merchant or a postmaster, to also act as express agent has been followed by the Express Agency, and its predecessor companies, for many years. Thus, Mr. W. H. Chandler writing in his book "Express Service and Rates". LaSalle Extension University, 1923, stated at page 10:

> "The agent at the important stations receives a salary, but at the small towns, notably in the West and South, he works on a commission basis. This commission is usually 10 per cent of the receipts of both incoming and outgoing business. In cases where this basis of payment is in effect, the whole time of the agent is not usually devoted to express service; he may be postmaster, or general storekeeper, or he may be joint agent for the railroad and the express company."

The express work performed by these commission agents, is an integral part of the regular daily transportation service which the Express Agency, as a common carrier, offers to the general public. It is in general the same day to day routine express work which is normally carried on at an express office. In order to properly perform this work it is necessary that it be coordinated with the movement of railroad transportation.[72] Thus Rule 214 of the Express Agency's "General Rules and Instructions" provides that:

3681 "Agents must be prepared to unload and load express matter promptly to avoid delay to train. At offices supplied with trucks, matter to be forwarded must be loaded on trucks before arrival of trains, and trucks positioned so that they can be quickly drawn to trains."[73]

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[72] As the Interstate Commerce Commission said in 190 I. C. C. 750 (1932), at page 777:

> "An essential feature of express service is speed. The service must of necessity by synchronized with the train schedules of the railroads and steamer lines, and the pick-up and delivery service must provide for the latest possible pick-ups and the earliest deliveries."

[73] With respect to this Rule, Mr. Hall, assistant to the Vice President in Charge of Operations, Chicago, Illinois, testified that the Rule would be applicable to merchant agents "who had any volume of traffic". (48R. 450.) Although Mr. Hall also testified that few if any merchant agents would handle express of sufficient volume to delay a train, he stated, in answer to the follow question.

> "But suppose we would have a merchant agent out here, Mr. Hall, who has a lot of baby chicks in the baby chick season. Would you expect him to be prepared to load and unload express matter promptly so as to avoid delay of trains?"

that:

> "*I would, yes, and he would understand that he was supposed to do that.*" (Emphasis supplied.)

Examination of the Express Agency's Exhibits XXXI-A, B, C, and the gross commissions reported therein for the

Even if the community is not served by a railroad it is necessary that the shipments be handled promptly and expeditiously, in order to insure that the express shipments will make proper railroad connections.[74] As the at-
3682 torney for the Express Agency stated, at page 40 of the 1948 hearings:

> "The word 'express' connotes promptness, and *when we hire an agent as an express agent, whether he is*

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individual agents, clearly indicates that although some agents apparently handle a very small volume of express business there are others who apparently handle a rather large volume of express business. This is also shown by testimony introduced in these proceedings. For example, although Agent Westfall, Newbery, Indiana, averaged only about five shipments a day; Agent Sterrenberg, Charlotte, Illinois, handled only 2 shipments in March, 1948, and Agent Korff, Armstrong, Indiana, handled 5 shipments in March, 1948; Agent Buckles, Edwardsville, Illinois, handled 1605 shipments in March, 1948; Agent Hutson, Newton, Illinois, handled 606 shipments in March, 1948, and Agent Butts, Bedington, West Virginia, handled 1199 shipments in May, 1938.

[74] Nauvoo, Illinois, is an example of a community which is served by an express truck instead of a railroad. When agent Horton at Nauvoo was questioned regarding the prompt handling of express shipments he stated that the Express Agency had never told him to handle express promptly. The Express Agency's attorney then interrupted the testimony to state: "We will concede that the Express Agency expects those shipments to be handled in an expeditious manner. That is one of the specifications of the work." (48R, 40.) Later when agent Horton was asked the following question:

> "Now, when you took that over [the express agency at Nauvoo] you also had in mind, did you not, not only the public but also to render to the public a standard express service which the Railway Express Agency is noted for in its reputation in that particular field? You did intend to maintain that standard of service, did you not?"

He replied:

> "Oh, yes, sure." (48R, 42.)

a merchant agent, a salaried agent or what have you, we expect that he will act as an express agent." (Emphasis supplied.) [75]

All commission agents are furnished with a copy of Circular 93-A, general accounting instructions for commission offices, and they all account generally to the Express Agency on the same forms.[76] Similarly, the same form,

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[75] The necessity for prompt and efficient service on the part of express agents is illustrated by the Express Agency's own words, as they appear in the 1936 edition of the "General Rules and Instructions", immediately following the "Notice to Employees" in the front of the manual (similar statements were contained in the 1924 and 1948 editions):

"General Remarks"

> "The business of the Company is *to forward by rapid conveyance*, shipment of Merchandise, Perishable Freight, Live Stock, Live Animals, Jewelry, Bullion, Coin, Currency, Bonds, Valuable Papers, etc., *and to deliver same promptly;* to make collections with or without goods; to fill orders; to attend to commissions; and to sell and pay money orders, travelers cheques, etc." (Emphasis supplied.)

[76] At page 10 of its main brief the Express Agency states that the exclusive commission agent makes two reports that merchant agents are not required to make, (1) the exclusive commission agent is "required to report to Express Agency as to expenses in the operation of pickup and delivery trucks furnished by Express Agency", and (2) he is "required to solicit business and report his efforts to Express Agency on Form 156, Exhibit XXVIII entitled 'Report of Public Relations and Sales Activities'." As to item (1), Superintendent of Organization Lace testifying at pages 487-488 of the 1948 hearings, in speaking of forms completed by exclusive commission agents, stated "*If* we furnish the motor vehicles, we require a report of expenses on that." (Emphasis supplied.) He did not state, however, that such a report would be required from the exclusive commission agent if the agent himself furnished the pickup and delivery truck. Since the Express Agency doesn't furnish merchant agents with pickup and

Form No. 95, is used for the transfer of accounts from one agent to another at all commission agencies.[77]

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delivery trucks they would, of course, not be expected to complete a form which is only required when the Express Agency furnishes the motor vehicles used. The record does not indicate that the Express Agency ever furnishes pickup and delivery trucks to its joint agents and, presumably, they, like the merchant agents, and apparently like any exclusive commission agent who might perform pickup and delivery work in his own truck, would not be required to complete this report. As to item (2), Mr. Lace testified that the joint agents, who have been conceded to be employees, are, like the merchant agents, not required to complete Form 156. Moreover, since he also testified, at page 365 of the 1948 hearings, that "we require salaried agents and exclusive commission agents to do certain public relations and sales work and render their reports on work which is done", it would appear that the caretaker or custodian agents and the "other commission agents", who have also been conceded to be employees, are, like the joint agents and the merchant agents, also not required to complete Form 156.

[77] Form 95 reads in part as follows:

"Special Instructions To Agents"

> "The Railway Express Agency, Inc., will not be responsible for money in excess of $ carried over night. The Agent at this station is authorized to leave in office safe over night financial paper and funds not exceeding the amount specified. All funds in excess of that amount should be remitted by first train to depositary of this Company. No funds, financial paper, or other valuables should be left in safe at night, unless Agent or other employee of the Express or Railway Company sleeps or works in office or adjoining room all night, nor in office at other times when Agent is absent therefrom, unless some other bonded employee is on duty and in charge. Where office is furnished with a safe, but agent or other employee of Express or Railway Company does not sleep or work in office or adjoining room all night, or at office not provided with a safe, money, financial paper and valuables must be taken home by the agent

Footnote 77—Continued:

at night. Railroad Agents who also act as Agents for the Express Company may follow the rule of the Railroad Company.

"I understand that the rate of commission allowed at this agency is ...... % on all L. C. L. express charges and ...... Maximum ...... Carloads: Local Shipments ...... % Min. ...... Max. ...... Interline Shipments ...... % Min. ...... Max. .... I have this day been instructed by Route Agent ...... regarding the handling of money and valuables and the manner in which express remittances are to be forwarded from this office.

"I fully understand that express remittances will be handled as follows, and I will make no change in this plan without written authority from Superintendent's office.

"I certify that the above is a true statement of my Accounds and Cash. *Instructions shown hereon are fully understood and will be complied with.*	Receipt of Cash and other items shown above are hereby acknowledged. *Instructions shown hereon are fully understood and will be complied with.*
(Emphasis supplied)	(Emphasis supplied.)
Employee Position	Employee Position"

With respect to Form 95, and the handling of funds at joint railroad-express agencies, General Auditor Gross, in reply to questions by the Telegrapher's attorney Mr. Hassenauer, testified at the 1937 hearing as follows: (37R, 21-22)

"Q. What means is taken by the Railway Express Agency to protect the funds collected for the Agency by these joint employees?

"A. *The form 95 which the agent is required to do as to protecting the company's funds at* joint railroad express agencies or *any commission agency. The special instructions speak for themselves.* (Emphasis supplied)

"Q. But they apply uniformly, do they not?

"A. I wouldn't say that that was so.

"Q. Is there anywhere on this sheet anything that shows that it might be a joint agency that is paid on a commission basis?

"A. It wouldn't appear so from these instructions.

Footnote 77—Continued:

These exclusive commission agents are a much larger agency and probably would have facilities that a joint railroad express agency would not have.

"Q. But the same form is used throughout?

"A. Yes, the same form is used by the joint agents that is likewise furnished the exclusive agents by the Express Agency.

"Q. What are you referring to?

"A. To Exhibit No. 10. This form is prepared at the time of the audit and a copy is left with the agent.

"Q. With respect to any funds that are on hand and in the possession of any joint agent, what precaution is taken by the Railway Express Agency to safeguard the funds? I am not speaking about this exhibit, Mr. Gross. What precaution is taken by the Railway Express Agency with regard to any funds collected by joint agents and in his possession before he has an opportunity to turn it over to his superior in charge or officer who comes around monthly and makes these audits?

"A. These audits are not made monthly.

"Q. What becomes of the funds on hand? What instructions, if any, does the agent receive?

"A. *This form gives the agent instructions* and the agent assumes the responsibility and if he has funds in excess of the amount he is *allowed* to keep overnight, he remits to the Assistant Treasurer of the Company. (Emphasis supplied)

"Q. How frequently?

"A. Depending on the amount collected.

"Q. Is he *permitted* to retain these funds in his sole possession or cause them to be deposited in some safe or vault in the meantime? (Emphasis supplied)

"A. *No, I think these special instructions say just exactly how he is to protect them.*" (Emphasis Supplied)

Similarly, in the 1948 hearings, The Express Agency's witness, Mr. Hall, testified that the instructions on Form 95 relative to the amount of cash the agent could carry over night would be applicable to merchant agents, and Witness Lace testified that the merchant agents were furnished with remittance envelopes in which the money to be transmitted to the Express Agency was to be placed.

3683 Likewise, all commission agents, irrespective of
whether they have been called exclusive commission
3684 agents, joint railroad-express agents, caretaker or
3685 custodian agents, merchant agents, etc.,[78] have
generally been required to complete the Express
Agency's Form No. 100, "Application for Employment",[79]
which is the same form completed by the salaried agents
and all regular express employees.[80] However, only those

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and that they were then to address such envelopes to the Express Agency's Assistant Treasurer, and to obtain a receipt therefor from the messenger or trucker who serves their office. He added that in a few instances, the agents were permitted to send their remittances by mail.

[78] The terminology used in referring to the various classes of individuals in the express service has not been uniform throughout that service. This may be due, at least in part, to the fact that the Express Agency's predecessor companies each used a nomenclature peculiar to itself and now having various shades of meaning in the express business.

[79] Although one witness, Mr. Hall, testified that when he was an express superintendent it was not customary for merchant agents to fill out Form No. 100, an examination of the evidence indicates that this generally was customary, and that, as stated at page 16 of the Express Agency's main brief, the form was "generally" completed by merchant agents. Thus, the Express Agency's Superintendent of Organization, Mr. Lace, who testified that he had worked for the Express Agency for 28 years, stated that it had been customary for merchant agents to sign the Application for Employment "Ever since I have been in Express business". (48R, 235).

[80] Prior to November, 1945, this form also contained an "Application for Fidelity Bond and Agreement as to Losses by Negligence and Defalcation", which read in part as follows:

> "This Agreement, made this day of , 19 , between hereinafter called the 'Subscriber' and the Railway Express Agency, Incorporated, hereinafter called the 'Company'.

entering the exclusive service of the Express Agency have
been required to furnish personal photographs and state-
ments of their previous employment records.[81] Simi-
3686 larly, all agents, except the limited (branch) agents,[82]
have generally been furnished with a copy of the

"Witnesseth: That in consideration of the employment of the Subscriber by the Company and of the wages paid or to be paid to him by it and of other valuable consideration, receipt whereof is hereby acknowledged.

"A. The Subscriber agrees that he will throughout his employment by the Company *faithfully perform all of his duties*, including the keeping of true and correct accounts of the business of the Company conducted by him or in his charge, *all as required by the rules and regulations of the Company;* and he understands and agrees that he is to be held personally responsible for the repayment to the Company of any and all losses which it may sustain through his failure to do so." (Emphasis supplied.)

[81] Rules No. 1013 to 1016, inclusive, of the "General Rules and Instructions."

"The Rules, Instructions and Information contained herein are intended for the guidance and use of the Company's employes only. The business of the Company must be transacted strictly in accordance therewith.

"Employes must make a thorough study of these Rules and Instructions. The plea of ignorance will not be accepted as excuse for mistakes made in transacting any part of the business.

"The Rules and Instructions are based on the character of forms and the conditions which prevail at the majority of offices. At offices where the use of special forms of waybills, delivery sheets, etc., has been authorized, employes will be governed by the instructions issued in connection with such special forms.

[82] In a few instances limited agents have been furnished with a copy of the Express Agency's General Rules and Instructions, but this has usually been at their own request.

Express Agency's "General Rules and Instructions".[83] The 1924,[84] 1936 and 1948 issues of the "General Rules and Instructions", the only editions introduced in evi-

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[83] Thus, the Express Agency states at page 13 of its main brief that the "General Rules and Instructions" are "furnished employes and all agents, except branch agents, whether they be salaried, exclusive commission, joint or merchant." See also the Express Agency's opening statement in the 1948 proceedings; Route Agent McAdam's testimony in the 1948 proceedings, and Superintendent Huff's testimony in the 1938 proceedings. Although Witness Hall (assistant to the Vice President in Charge of Operations, Chicago, Illinois) testified that he had never furnished a merchant agent with a copy of the "General Rules and Instructions" because he felt they had little need for them, and that he wouldn't expect a merchant agent to read them, he also testified that certain of the rules and instructions were applicable to merchant agents: for example, *Rule 214*, would be applicable to merchant agents having any volume of traffic; *Rule 263* would be applicable; *Rules 1079 and 1080* would be applicable to any merchant agents having dial scales, and *Rule 1092* would be applicable to a merchant agency having a safe. It may also be noted that of the six commission agents who testified in the 1948 proceedings all of them stated that they had received a copy of the "General Rules and Instructions", except agent *Horton* who testified that he didn't know whether he had received a copy.

[84] It appears that similar books of instructions may have been used by the Express Agency's predecessor companies even prior to 1924. Thus, W. H. Chandler, in his book "Express Service and Rates", La Salle Extension University, 1923, states at pp. 11-12:

> "*Book of General Instructions.*—For the guidance of employes each express company issues a book of general instructions regarding the conduct, outlining the duties, and defining the authority vested in each class of employes. The scope of the instructions is broad and covers in the minutest detail the duties of employes. Among other things they provide that each employe must be bonded before assuming active duties. Employes are forbidden to drink intoxicating liquors during office hours, and their use at all times

dence in these proceedings, contain in the beginning, the following "Notice to Employees", from the Company's president:

> "The Rules, Instructions and Information contained herein are intended for the guidance and use of the Company's employes only. The business of the Company must be transacted strictly in accordance therewith.
>
> "Employes must make a thorough study of these Rules and Instructions. The plea of ignorance will not be accepted as excuse for mistakes made in transacting any part of the business.
>
> "The Rules and Instructions are based on the character of forms and the conditions which prevail at the majority of offices. At offices where the use of special forms of way-bills, delivery sheets, etc., has been authorized, employes will be governed by the instructions issued in connection with such special forms.
>
> 3687 "Special instructions hereofore issued by circulars, unless superseded by rules laid down in this book, remain in force."[85]

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is discouraged. Gambling is absolutely prohibited, under penalty of dismissal. The authority and duties of agents are outlined. Agents are instructed to solicit business actively and to treat as confidential all matters referring to the shipments intrusted to them. Full instructions are given relating to fire losses, suits, payment of taxes, and handling of claims. The order and commission business, the handling of money and valuables, the collection of C. O. D.'s, the transmission of money by telegraph or by cable, the general rules relating to accounting, are all treated under their respective heads in the manual of instructions. Each express employe is required to familiarize himself with the rules."

[85] Likewise, Rule 794 of the "General Rules and Instructions specifically provides:

> "*The Company's General Rules and Instructions appearing in this book and Supplements thereto, also Operating Department General Circulars, must be faithfully and uniformly observed in transacting the Company's business.*" (Emphasis supplied).

The 1936 and 1948 editions of the "General Rules and Instructions" consist of some 1155 rules or instructions relating to various phases of the express work. The manual, or book of rules and instructions, is divided into five parts: (1) Operation, (2) Loss and Damage Prevention, (3) Organization, (4) Management, and (5) Property. Under Parts (1) and (2) are included rules for the acceptance, transportation and delivery of shipments, and their protection from disappearance and injury, such as:

> "Rule 13. The state name must be written out sufficiently to avoid confusion: for example, Calif. and Colo. for California and Colorado; Utah and Vermont, not Ut. and Vt.[86]
>
> 3688 "Rule 40. Any old Addresses, Marks or Labels appearing on shipments must be effectually erased before receipt is issued. Shipments must bear address on one consignee only. (See Rule No. 9.)
>
> "Rule 41. No labels should be placed on Money Classification shipments. The words 'Paid' and 'C.O.D.' may be stamped or entered in writing. On packages containing money, bonds and securities, $500.00 or over, receiving employe must write his name, date and the time of day when accepted.
>
> "Rule 43. Except when applied to baggage, labels must be placed directly on the address side of shipments, and as near consignee's address as possible. They must not cover up shipper's name, address, identifying number, revenue stamps, precautionary labels, or other essential information.
>
> "Rule 44. Labels on baggage should be placed on the bottom to avoid defacement; but if tag is tied on

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[86] In the 1948 proceedings the Express Agency's attorney, Mr. Long stated, at page 255:

> "In order to provide for expeditious transportation and prompt delivery, Railway Express Agency requires of its agents a certain standard as to the marking of shipments. For example, see Rules 10 and those following of the General Rules and Instructions, particularly Rules 13 * * *".

baggage, labels other than address labels must be pasted on back of tag.

"Rule 47. How Charges Are to be Paid must be shown by a Prepaid Form No. 2 or Collect Form No. 1 label; a prepaid (yellow) label when charges have been paid in full or must be collected from the shipper or are free; a collect (white) label when the charges are to be collected from the consignee at destination. On shipments 'Prepaid in part' use label 817-A; when this form is not available, 'Prepaid in part' must be written directly under or across a Collect Label so that it cannot be overlooked when waybilled.

"Rule 152. When two or more shipments are entered on one receipt, each item must be checked by the employee accepting the shipment, his initial being used as a checkmark. Such employe must place his signature opposite the last entry and on the same line with that entry. If a shipment entered on the receipt is not accepted for any reason, notation to that effect must be made in lieu of check-mark.

"Rule 214. Agents must be prepared to load and unload express matter promptly to avoid delay to train. At offices supplied with trucks, matter to be forwarded must be loaded on trucks before arrival of trains and trucks positioned so that they can be quickly drawn to trains.[87]

"Rule 263. If consignee is an entire stranger and is unable to obtain personal identification, he must furnish conclusive evidence that the shipment was sent to him—first by correctly describing the contents thereof before shipment is opened—which latter must be done in presence of an employe effecting delivery, and second by surrendering shipping receipt if in consignee's possession. If a trunk, bag or valise, he should be required to produce the key. If agent still has any doubt as to the party being the proper consignee, the goods

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87. With respect to this Rule, the Express Agency's witness, Mr. Hall, testified in the 1948 proceedings, page 450, that the Rule would be applicable to merchant agents "who had any volume of traffic".

must be held and superintendent notified, giving full particulars. Letters, postal cards or bank books should not be accepted as positive identification.[88]

3689 "Rule 282. When a rubber stamp is used, the person using it must also write his name thereafter, thus: 'Jones and Smith Co.' (stamped), 'per R. A. Brown' (written).

"Rule 301. In the case of freight shipments of more than ordinary value, the agent or a thoroughly competent representative, should accompany the shipment when offered for delivery, and check Company inventory against consignee's invoice. If consignee's invoice cannot be produced, he should be requested to check the contents of the shipment against Company inventory and acknowledge its correctness thereon. Detailed memorandum should be made of any shortage.

"Rule 329. Agent at destination must give Shipper immediate notice of non-delivery—

(I) When shipper's instructions request it.

(II) When consignee refuses to accept.

(III) When contents are perishable.

(IV) When payor of a collection refuses to pay same within twenty-four hours.

(V) When C.O.D. shipment cannot be delivered within twenty-four hours.

(VI) If consignee or consignee's address is unknown.

"Immediate notice to shipper in cases where the address shown on shipment is outside of our delivery limits, or at points where no delivery is maintained, is not required. In such cases, consignee must be promptly notified and allowed reasonable time to act before notice of non-delivery is mailed to shipper. The notice to shipper should show that consignee has been notified and failed to call.

"Rule 341. Enter on back of delivery sheet and on office record portions of On Hand Card Record, Form

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[88] The Express Agency's witness, Mr. Hall, testified in the 1948 proceedings that this Rule was applicable to merchant agents.

563, the dates of first notices to consignee and shipper Commission agencies and salary agencies reportin other than daily, should enter the dates of first notice to consignee and shipper on the regular delivery sheet unless On Hand Card Records are made at the tim shipments are first put On Hand. The dates of the notices to consignee and shipper should be transcribe to On Hand Card Record when that record is prepare

"Rule 509. Special supervision and close attentio to handling of shipments must be given to preven damage in loading and unloading of cars and in th movement on trucks.

"Rule 516. Employes are cautioned that roug handling of shipments cannot be permitted under an circumstances. Special care must be exercised in th loading and stowing of freight on trucks and in car to protect the lighter shipments and others which require special protection.

"Rule 517. There are many shipments moving by express which must necessarily be handled right side up. Among these are storage batteries, x-ray tubes, neon signs, radio transmitting tubes, pony refrigerators, berries and other small fruits, and vegetables, cases of eggs, live animals, birds, fish, etc., including live lobsters and soft shell crabs, also freight 'on skids.' These shipments must be given the special handling they require.

3690 "Rule 541. In case an animal valued at $25.00 or over, dies while in transit, and the cause of death is not definitely known, a veterinarian should be promptly calle dby agent at the point where the dead animal is first unloaded to determine the cause of death—by post mortem if necessary.

"Rule 621. It is essential that money and valuable packages and financial paper be at all times given the best of protection available. To this end Agents must closely follow special instructions relating to individual offices issued by Superintendents as conditions require."[89]

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[89] In a memorandum dated February 26, 1937, addressed to "All Agents" and entitled "Care and Protection of

"Rule 622. Office Safes must be so located if possible as to be accessible only to the person authorized to use them, and if possible they should be placed out of the view of the public. The combination must be worked privately. When not in use, safes must be kept locked and the key removed or the combination completely thrown off. To insure their being locked, safes must always be tried after the key has been withdrawn or the combination thrown. A safe must not be left on what is known as the 'day lock'.[90]

"Rule 632. At offices not provided with proper facilities for keeping and guarding money and valuables, messengers must not leave, and agents must not accept, such shipments unless authorized by Superintendent, if delivery cannot be made the same day; but shipments must be carried to office designated by Superintendent or Route Agent.

"Rule 641. Firearms for defensive purposes will be furnished employes having money or valuables in charge, where Superintendent deems it necessary.

"Rule 644. No excuse will be accepted for failure to keep weapons in first class condition and ready for instant use. Disregard of this rule will constitute reason for discipline.

Money and Valuables", Mr. I. Longaker, Superintendent of Agencies, for the Railway Express Agency, Inc., Chicago, Illinois, stated:

> "You will please give special attention to rules 610 to 650 inclusive, and see that interested employees are familiar with these instructions and comply with same; and in fact, it is absolutely necessary that you comply with all instructions applying to the care of money and valuables in general." (Exhibit 1B, Part 2, 1938 hearing).

[90] In testifying with regard to the application of this Rule during the 1948 proceedings the Express Agency's witness, Mr. Hall, stated:

> "Well, as to the location, I would say that would be up to the merchant agent in his place of business. The provision that it be kept locked should be complied with and he would be required to do that." (48R. 451.)

"Rule 692. Sealing Bags: Employes who are supplied with Porter Safety Seals must use them for sealing all bags containing money and valuables. These seals must be applied in accordance with special circular or directions issued to govern their use. When Porter Safety Seals are not available, bags must be securely stitched, tied and sealed with wax, as follows:[91]

3691 "Rule 693. Double a piece of twine of sufficient length and pass the loop through the eyelet of the addressed tag to form a noose, through which pass the cut end of the twine, knotting same as close as possible to the tag. After plaiting the neck of the bag in four or more folds of not more than one inch, wind the twine tightly several times around the neck, and after knotting if bag has no ringed eyelets, stitch through the plaits with a needle, one end above the encircling twine, and one below; if the bag has ringed eyelets therein, the twine must be passed several times through such eyelets, during the process of winding the twine around the neck of the bag.

"Rule 694. After stitching, or passing twine through ringed eyelets of bags so equipped, tie again and pass ends of twine through the tag eyelet to back of tag, sealing with wax over the twine exposed. Place another seal over the knot on the bag at the opposite side from the tag.

"Rule 737. Employes must make a careful inspection of seal on bags, and safes to see that the number of the seal corresponds with the number entered on the record and that the seal has been properly applied."

Under Parts (3) and (4) are included the regular duties of agency and messenger forces and the business involved in carrying on an agency, such as:

"Rule 790. The local agent has jurisdiction over his office and its branches, and authority over employes within his jurisdiction.

"Rule 794. The Company's General Rules and Instructions appearing in this book and Supplements thereto, also Operating Department General Circulars, must be faithfully and uniformly observed in transacting the Company's business.

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[91] The Express Agency's witness Mr. Hall testified that merchant agents are not furnished with safety seals.

"Rule 795. In making rates and prices for express transportation, employes must be governed by the Official Express Classification, the Directory of Express Stations, the Block Tariffs, the Schedule of Express Rates and other published tariffs in effect on date of shipment. They must observe them to the letter. The express company and its employes individually are liable to legal penalties if they deviate from published rates and tariffs in effect at time of shipment.

"Rule 796. Tariff Department Circulars relative to the handling of foreign business, Government business, liquor, corpses, live stock, live animals and bees, fish and game, horticultural and nursery stock, meat and meat food products, explosives and inflammables with Federal and State Laws relating thereto, and other special circulars of the Traffic, Accounting and Transportation Departments, must be consulted and observed by all employes accepting and handling these shipments.

"Rule 802. Agents must familiarize themselves with the weight and measure laws of their city and state, and conform therewith.

"Rule 811. Agents must immediately report to Superintendent any misconduct or neglect of duty on part of train employes, including the drinking of intoxicating liquors while on duty, gambling, of any kind, carrying packages past stations, leaving safes unguarded or unlocked, sleeping while on duty, leaving cars unprotected, etc.

"Rule 842. Specific transactions of the Company, its manner and methods of handling money and valuables, and the volume of such traffic handled should be treated as confidential. Also transactions of and for its patrons must be so regarded. It is unlawful to give information to any person not directly connected with the transaction for which the information is desired, except an officer of the law in pursuance of his duty.

"Rule 891. Agents and platform employes are cautioned to see that trucks are always left a sufficient distance, never less than six feet, from the nearest track rail to prevent injury to anyone leaning from the train or passing along the platform between the tracks and truck.

"Depot trucks must have one wheel chained or blocked in a secure manner to prevent the possibility of truck drifting or being blown on tracks when unprotected.[92]

"Rule 892. Station trucks must be pulled, not pushed, and when it is necessary to back them for any purpose employes must, before doing so, assure themselves that no one is in the way.

"Rule 893. Trucks must not be wheeled close to car door until train comes to a full stop, and must be moved into the clear before train starts.

"Rule 894. Handles, unless provided with spring or counter-weight, must be hooked up when trucks are not in use. This to prevent persons falling over or colliding with them.

"Rule 956. In order that there may be a uniform method of attaching letters and papers to correspondence passing from hand to hand on the line, the first or earliest dated letter must be placed at the bottom of file, and subsequent letters above it, in regular order."

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[92] In answer to a question regarding the application of this Rule to merchant agents, Mr. Hall testified:

> "Well, if we furnished him with a platform truck, the route agent should instruct him as to the safety requirements of that rule." (48R. 452), and that the same would also be true with respect to Rules 892, 893 and 894.

In this connection it may be noted, for example, that *Agent Burns*, Sparta, Illinois, was furnished with platform trucks, and that *Agent Butts*, Bedington, West Virginia, was furnished with a couple of 4-wheel trucks.

Part (5) contains the rules for acquiring, disposal and care of the Express Agency's supplies, property and equipment. These rules include:

"Rule 1040. Supervision of all classes of property, equipment and supplies, is the duty of agents, who should instruct other employes in its care and use, and in avoiding waste of supplies. Everything should be kept in good working condition, and its appearance such as will reflect credit to the Company.

3643 "Rule 1042. Every salaried agent or other official should maintain on card Form 1119 or book Form 5042, as required, a record of all personal property and equipment on hand received, transferred, retired or otherwise disposed of. Route Agents will maintain record of personal property at commission agencies.

"Rule 1048. Agents are responsible for making requisitions and must sign them personally. They must see that they do not exceed office requirements as shown on approved Form 130. Requisitions must be accurately and legibly written and have name of office and state (using rubber stamp), also local department, entered in the proper spaces on face thereof. Where necessary to request quantities greater than shown on approved Form 130 letter of explanation should accompany requisition, and if increased quantities are to be permanent Superintendent should be requested to notify Supply Depot authorizing correction on Form 130.

"Rule 1057. Local purchases of equipment, stationery, printing or supplies are prohibited without advance authority from the General Purchasing Agent or Purchasing Agent.

"Exception: Matches, sawdust, ice, lights of glass, and lumber up to $10.00, may be purchased on special authority from Superintendent.

"Rule 1074. Testing of scales may be accomplished by using the loose weights accompanying beam scales. The starting test should be made to the capacity of such weight. Then replace the weights with any convenient material of equal weight; again adding the weights to their full extent and repeating the operation alternately to full capacity of scale. Shipments of different weights are usually available for carrying out this test.

"Rule 1075. Scales must be examined daily and kept free from dirt, paste, and other foreign matter.[93]

"Rule 1079. Weight should not be taken on dial scales until indicator hand comes to a complete rest.[94]

"Rule 1080. Dial scales should be so placed that reading of weight is in direct line with eye, otherwise reading is inaccurate.

"Rule 1091. Agents must keep safes where no one can take key impressions or meddle with the combination.

"Rule 1092. Safe doors should be closed gently; if they are slammed the tumblers may be dislodged, or the screws that hold them in position loosened.[95]

"Rule 1094. Office safe combinations should be changed at least once every year; and in every case where permanent or temporary change is made of employe holding office safe combination. If agent or employe holding combination does not understand how to change it, Route Agent or Superintendent must be advised. When combination is changed, the tumblers should be wiped with a clean, dry cloth. Tumblers should not be oiled.

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[93] In a memorandum dated September 27, 1934, addressed to "All Agents", Mr. I. Longaker, Superintendent of Agencies, Railway Express Agency, Incorporated, Chicago, Illinois, stated:

> "In order that you may generally be familiar with the policy and rules of the Railway Express Agency in connection with the question of differentiating between letters and documents which may be handled by express under U. S. Postal Regulations please familiarize yourself with Rules 1075 to 1084 of the General Rules and Instructions." (Exhibit B, Part 9, 1938 hearing.)

[94] During the 1938 proceedings Mr. Hall testified that if a merchant agent was furnished with dial scales Rules 1079 and 1080 would apply to him.

[95] According to Mr. Hall, Rule 1092 would be applicable to any merchant agency where they had a safe. In this connection it may be noted that Agents *Burns*, *Jordan*, and *Simpson*, for example, were all furnished with safes by the Express Agency.

"Rule 1111. In order to prevent accidental discharge of firearms, employes carrying revolvers must see that the chamber on which the hammer rests is empty. Under no conditions should a revolver be loaded to its full capacity. One chamber must be empty and the hammer must rest on this chamber.[96]

"Rule 1123. In Opening Pass Bags and other reusable wrappers never turn the knife point or edge toward the bag."[97]

The Express Agency concedes that all of the commission agents, are its employees except the so-called merchant agents, and those joint railroad-express agents and those caretaker or custodian agents, who perform their express work on premises not under railroad or express control through ownership, lease or some other arrangement.[98]

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[96] This rule was referred to in *Railway Express Agency v. Cox*, 179 F. (2d) 593 (C. A. 5, 1950).

[97] According to witness Hall, merchant agents do not handle the kind of bags referred to in this Rule and it is therefore not applicable to them.

[98] In stating that commission agents who perform their express work on premises owned or controlled by the Express Agency or a railroad are its employees, but that those performing their express work on premises not under railroad or Express Agency control are independent contractors, the Express Agency is attempting to make ownership or control of the premises where the work is performed the determining factor in employee status determination under the Railroad Retirement and Railroad Unemployment Insurance Acts. In order to do this it would be necessary to disregard the provision in the Acts that an individual is an "employee" if "he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service", and to rely solely on the provision that an individual is also an employee if "he is rendering on the property used in the employer's operations, other personal services the rendition of which is integrated into

3695 B. Employee Status of Commission Agents.

(1) Exclusive commission agents.

As pointed out above the Express Agency admits that the individuals referred to in these proceedings as exclusive commission agents are its employees, and their status, and that of their assistants, is not involved in these pro-

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the employer's operations". There is, of course, no legal basis for this type of statutory construction. Aside from this, however, it should be noted that the courts and various administrative bodies have often held individuals to be employees even though their work was performed on their own premises, or on other premises not owned or controlled by the employer. For examples of such decisions see: *Schwing* v. *United States*, 165 F. (2d) 518 (C. A. 3, 1948), (journeymen tailors); *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. (2d) 633 (C. A. 4, 1949), cert. den. 338 U. S. 900 (1949), (homeworkers); *Western Union Tel. Co.* v. *McComb*, 165 F. (2d) 65 (C. A. 6, 1947), cert. den. 333 U. S. 862 (1948), (personnel in telegraph agencies located in business establishments, such as a hotel, drug store, bus station, or the like); *Walling* v. *American Needlecraft*, 139 F. (2d) 60 (C. A. 6, 1943), (women doing needlework in their own homes); *Durkin* v. *Shone*, 112 F. Supp. 375 (E. D. Tenn. 1953), (individuals typing labels, addressing envelopes and preparing lists of names in their own homes); *Western Union Telegraph Co.* v. *George*, 194 So. 183 (Alabama, 1940), (telegraph messenger boy working for drug store which had a telegraph agency); *Case* v. *Industrial Commission*, 23 N. E. (2d) 652 (Ohio, 1939), (agent for laundry company); *Texas Power & Light Co.* v. *Adamson*, 205 S. W. (2d) 275 (Texas, 1947), (storekeeper and postmaster at one point, and variety store operator at another point, accepting payments of electric bills from individuals voluntarily coming to the places of business and paying the same, and transmitting amount collected to electric company); *Caradonna Broker Application* 21 M. C. 252 (1939), (owner and operator of a fruit store selling tickets for several bus companies). See also *Internal Revenue Bulletin, Cumulative Bulletin* 1937-2, page 382, for a decision holding individuals operating telephone exchanges in their own homes or stores to be employees within the meaning of the Social Security Act.

ceedings. These agents, sometimes also referred to as "exclusive agents,"[99] generally devote their entire working time to Express Agency service, but may, in some instances, engage in an independent business of their own. They perform their express work on premises owned or controlled by the Express Agency or railroad through ownership, lease or some other arrangement. The Express Agency states that the exclusive commission agent is granted the usual employee rights of free transportation,
3696 and paid vacations, but that they are not reported to the Interstate Commerce Commission as employees.[100]

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[99] The fact that an individual is sometimes referred to as an "exclusive agent" does not necessarily mean, however, that the Express Agency considers him to be an employee. For example, in Award No. 2522, dated March 31, 1944 (Vol. 23, p. 162), the National Railroad Adjustment Board, Third Division, refers to express agent Dolley at Truckee, California, as an "exclusive agent" of the Express Agency. However, in Exhibits XXXIABC the Express Agency lists Mr. Dolley as its "merchant agent" at Truckee from November, 1937 to August 11, 1944, and as its "merchant agent" at Tahoe Tavern, California, during certain months of the year from November, 1937 to May, 1944.

[100] According to the Express Agency, the exclusive commission agents may be subdivided into the following groups (pages 6-7 of the Express Agency's main brief):

"(a) Those who devote all of their time to the service of the Express Agency, and who earn a net return in excess of $125 per month. These agents are subject to the Rules Agreement between The Clerks and Express Agency, and their positions are subject to bid and placed upon a roster (R. 325).

"(b) Agents who devote substantially all of their time to the service of the Express Agency, but who may perform some independent business of their own, and who earn net commissions of less than $125 per month. This subdivision contains but very few indi-

(2) Joint agents and their assistants.

The Express Agency concedes that all joint railroa express agents are its employees, except those who p form their express work on premises not under railro or Express Agency control through ownership, lease some other arrangements.[101]

In the 1937 and 1938 proceedings the Express Agen

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viduals, and those who are within this subdivision g erally are former salaried employees. (R. 325.)

"(c) Those who devote all of their time to t service of the Express Agency and who earn duri the course of the year an average net return of le than $125 per month. These agents are not subje to the Rules Agreement with The Clerks, and th positions are not subject to bid and are not plac upon a roster. (R. 485.)"

101. In its reply brief the Express Agency conten that joint railroad-express agents who are also engaged outside activities, and who perform their express work premises not controlled by the Express Agency or a ra road through ownership, lease or some other arrangeme are actually merchant agents, and that "A man is a joi railroad-express agent only when he performs service f both companies on railroad premises during the sa working hours." (Reply Brief, p. 12.) In the 1938 hea ing General Auditor Gross in speaking of "mercha agents" who serve the railroads as well as the Expre Agency, and who are also engaged in some other busine stated at page 3:

> "* * * because they did serve the railroads and t express company, we consider them as joint railroa express agents, notwithstanding they had other acti ties."

For the purposes of this Report, the term joint agent, joint railroad-express agent, is meant to include all ind viduals who act as agent for both the Express Agency a a railroad, irrespective of whether they also engage in oth business activities and irrespective of whether their e press work is or is not performed on premises owned controlled by the Express Agency or a railroad throug ownership, lease or some other arrangement.

contended that the joint railroad-express agents were
3697 in exactly the same position as the merchant agents, and that the individuals in both classifications were independent contractors. Thus, in the oral argument before the Examiner on January 17, 1938, Albert M. Hartung, Esq., General Solicitor of the Express Agency stated, with regard to joint railroad-express agents and merchant agents, at page 5:

> "They are required to perform exactly the same duties; they use exactly the same forms, they are required to make the same reports, they are compensated on the same basis."

And at pages 28-29:

> "The same form of application is taken from all persons whether they be railroad agents or draymen or storekeepers. I think Mr. Hassenauer's argument might be construed as indicating that there is some distinction, but there is no distinction; it is taken from all these people. As to the question you asked, Mr. Examiner, as to whether these arrangements are made often or to what extent, they are quite common and change from one to another depending upon the business need. Mr. Owens testified as to one place where the railroad agent did not wish to handle the express business and the express company made an arrangement with a local merchant, I think, for the express business. Now that local merchant handles that express business as a side-line just the same as the railroad agent handles it as a side-line. He handles it as an independent contractor, just as the railroad agent handles it as an independent contractor. The relationship in every instance is the same, made in the same way, subject to exactly the same requirements, whether the man be a railroad agent, or a drayman or a storekeeper; he must use the same form of receipt, collect the same charges, make the same reports, receive the same rate of commission. The checking of his accounts from time to time is just the same as the railroad agent's; the supervision, if you choose to call it that, is the same in one case as another."

And again, at page 30:

> " * * * but whether the arrangement is made with
> joint railroad agent or a drayman or a storekeep
> all the conditions which exist are the same. Now th
> is highly important and significant, because if you ho
> that the railroad agent who serves also as an expre
> agent, is an employe of the express company with
> the meaning of the Railroad Retirement Act, then y
> must hold likewise that that drayman or that count
> storekeeper is an employe of the express company

Following the 1937 and 1938 proceedings the Board,
August 1, 1939, held the joint railroad-express agents a
the merchant agents to be employees of the Express Agen
within the meaning of the Railroad Retirement Act. T
Express Agency did not seek judicial review of the Board
decision, and the service rendered by the individua
3698 described in the decision as joint agents and mercha
agents was thereafter included in the computation
annuities awarded such individuals under the provisions
the Railroad Retirement Act.[102] In 1946, however, the E

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[102] Administrative finality attaches to the annuity ce
tifications which have been made on the basis of Boa
Order 39-502, dated August 1, 1939, and such certificatio
could not now be reopened or cancelled even if it shou
be held that the service, or some part thereof, was not cre
itable as employee service under the Acts, and that the E
press Agency was entitled to the refunds which it ha
claimed under the Carriers Taxing Act, now the Railroa
Retirement Tax Act. However, if it should now be hel
that express merchant agent service is not creditable und
the Acts, the spouses and widows of such agents, not pr
viously awarded a spouse or widow's annuity, would n
thereafter be entitled to such an annuity based on the
husband's express merchant agent service. (For a discu
sion of the principles of finality, and their application, s
opinion of the Board's General Counsel L-39-527, 1939 R.
83, dated August 16, 1939, and opinions of the Board'
Associate General Counsel L-52-72, dated February 1
1952, L-53-495, dated October 15, 1953, and L-54-204, date
May 11, 1954.)

press Agency brought suit against the bureau of Internal Revenue to recover the taxes paid under the Carriers Taxing Act (now Railroad Retirement Tax Act) on the compensation of certain individuals performing express work, including the joint agents (*Railway Express Agency, Incorporate v. Joseph T. Higgins, Collector of Internal Revenue*, Order of Railroad Telegraphers, Interveners, Civil Action No. 35-688).

The joint railroad-express agents and the merchant agents were also included in the Express Agency's demand for the refund of contributions paid under the Railroad Unemployment Insurance Act. In the course of the 1948 hearings, however, the Express Agency waived its demand for refund with respect to the joint agents and conceded
that they were its employees.[103] Later, however, it
3699 stated that joint agents who performed their express
work on premises not under railroad or Express

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[103] Although the Express Agency's attorney, Mr. Long, stated at page 290 of the record that:

> "Our concession that for the purpose of this hearing all assistants, helpers and employees of joint agents are employees of Railway Express Agency does not include any individual who performs pickup and delivery service at a joint agency, nor does it include, insofar as the agent himself is concerned, performance by the agent of pickup and delivery service,"

he later stated, with regard to individuals regularly employed by the joint agent to perform pick-up and delivery service in vehicles owned by the joint agent, that those "who perform platform work or railroad work in addition to driving pick-up and delivery vehicle" are conceded to be employees, but those who "do no express work or railroad work other than driving pick-up and delivery vehicle" are not employees. (48R, 583.) In view of this subsequent statement, it seems clear that, although not specifically stated in the record, the Express Agency, in conceding that these assistants were its employees, must have also intended to include, as employee service, pickup and delivery service performed by the joint agent.

Agency control through ownership, lease or some other arrangement, were considered to be independent contractors.

Although the Express Agency stated that it was conceding that the joint railroad-express agents were its employees, "solely for the purpose of this proceeding", there is no doubt but what such agents are "employees" of the Express Agency with respect to their express work, just as they are undoubtedly railroad employees with respect to their railroad work.[104] Thus, the Supreme Court of the United States in *Telegraphers* v. *Ry. Express Agency,* 321 U. S. 342 (1944), referred to joint railroad-express agents in the following language, at page 343:

> "Employees here involved are agents at stations on the Seaboard Airline Railroad, who primarily are employees of the railway and secondarily of the railway express agency; they receive compensation from each employer."[105]

The National Railroad Adjustment Board has also held that joint railroad, express agents are employees of the

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[104] See Part II of this Report dealing with the legislative history of the Railroad Retirement and Railroad Unemployment Insurance Acts.

[105] See also *Railway Express Agency* v. *Mackay,* 181 F. (2d) 257 (C. A. 8, 1950). In that case Mackay, a joint railroad-express agent, brought suit against the Express Agency to recover damages on account of certain brokerage fees earned by him, but collected and retained by the Express Agency. In defending the suit the Express Agency contended that Mackay was its agent, and that whatever he did as broker he did as its "agent or employee" without any express or implied understanding that his compensation would be anything more than the monthly allowance which it had agreed to pay him. Mackay contended, on the other hand, that the brokerage fees involved were earned by him as an independent custom-house broker and not in his capacity as express agent. The lower court held that the fees were earned by Mackay in his capacity as an independent custom house broker, and not in his capacity as express agent, and this decision was affirmed by the Court of Appeals.

Express Agency, with respect to their express work, 3700 within the meaning of the Railway Labor Act. See, for example, Decisions of the National Railroad Adjustment Board, Third Division, Award No. 537 (1937), Vol. 5, p. 174, at p. 185, the express agency is the "secondary employer" of the joint agents; Award No. 548, Vol. 5 (1937), p. 232 at p. 242, "the carrier [Railway Express Agency, Incorporated] and the employes [joint railroad-express agents] involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934," and Award No. 4792 (1950), Vol. 45, p. 970 at p. 992 "the Carrier [Express Agency] and the Employe [joint agent] involved in this dispute are respectively Carrier and Employe within the meaning of the Railway Labor Act, as approved June 21, 1934". In connection with the Express Agency's statement in the proceedings in Jurisdictional Docket No. 2-2A, referred to above, that it was conceding that joint agents were its employees "solely for the purpose of this proceeding" it may be noted that in Award No. 4792, mentioned above, the Express Agency, in stating its position in that controversy, apparently made no contention that the joint agent was not its employee.

The fact that most joint railroad-express agents perform their express work on premises under railroad or Express Agency control, while others perform their express work, or both their railroad and express work, as the case may be, in their own office, store or other business establishment does not, of course, determine their legal relationship to the Express Agency.[106] As previously pointed out, the true test is whether the "employer" possesses the right to supervise and direct the manner of rendition of the service which the individual performs. This is in accord with the well-established doctrine that in the determination 3701 of whether an employer-employee relationship exists, the essential question is whether the employer has the right to exercise control over the manner of rendition of the service, irrespective of whether the right to control is ever actually exercised. There is nothing in the record to show that the express work performed by the joint agent who operates his agency in the railroad station is any different from the express work performed by the joint agent who operates his agency in his own elevator, store or other business establishment, or that there is any difference as to the manner in which the work is performed, or in the supervision exercised over such work. It necessarily follows therefore that the joint agents who perform their express work on premises not under railroad or express control are just as much "employees" of the Express Agency in the performance of their express work as are the joint agents who perform their express work in railroad stations. However, no opinion is expressed as to whether any pickup and delivery service preformed at a joint agency as a part of a general drayage business is employee service under the Acts.[107]

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[106] For example, consider the agencies at Elyria, Kansas, and Linthicum, Maryland. The joint railroad-express agent at Elyria, Kansas, performs at least most of his work in his own elevator, which he operates on part of the railroad right-of-way which he has leased from the railroad. Elyria, Kansas, is not listed in the merchant agent exhibits, and no contention was made, in the record,

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by the Express Agency that the joint agent is anything but an employee with respect to his express work. On the other hand, agent A. W. Fletcher at Linthicum, Maryland, rented the closed railroad station at that point from the railroad and used it as a store and express office. He is listed in the exhibits as the merchant agent at Linthicum from January 1, 1937 through August, 1942.

[107] While it is very likely that any express pick-up and delivery service performed by a joint agent as part of a general drayage business conducted by him would not be creditable (*Roth* v. *Harrison*, C. C. H. Railroad Retirement Report, p. 4125 (N. D. Ill., 1946, Civil No. 44C-456)) the record contains no testimony on this point.

The Express Agency concedes that the individuals regularly employed by the joint agents to assist them in performing express work at the railroad station are employees within the meaning of our Acts, but it denies that the individuals casually, intermittently or seasonably employed by the joint agents to assist them in their work at the railroad station are its employees. Since the Express Agency concedes that the joint agents, and those regularly assisting them at the station, are employees,[108] there is no basis for holding that other individuals assisting the joint agents in performing their work at the station are not
3702 employees simply because their work is casual, intermittent or seasonal. There is no provision in either the Railroad Retirement or Railroad Unemployment Insurance Acts exempting casual intermittent or seasonal labor from their coverage, and Section 203.3 of the Board's Regulations (20 C. F. R. § 203.3(b)) makes it clear that it is immaterial whether or not the service is performed on a part-time basis.[109] Consequently, it is clear that if the service can be identified as to extent or time, the service,

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[108] As previously pointed out, the Express Agency also contends that joint railroad-express agents who perform their express work on premises not under railroad or Express Agency control are not its employees. In view of the opinion expressed in this report that mere ownership or control of the premises is not determinative of an individual's status under our Acts, and that a joint agent performing express work on his own premises is just as much an Express Agency employee as the joint agent performing express work on premises under railroad or Express Agency control, it follows that an individual regularly assisting the joint agent on his own premises is just as much an Express Agency employee as the individuals regularly assisting the joint agent at the railroad station.

[109] A similar provision was contained in the regulations which became effective June 1, 1938 (3 FR 1478, 1480), and has been retained in subsequent revisions of the regulations.

and the compensation attributable thereto, may be credited under our Acts.[110]

The Express Agency also concedes that the individuals regularly employed by the joint agents to perform pickup and delivery service in vehicles owned by the joint agent, and who also perform platform work or railroad work in addition to driving the pickup and delivery vehicles, are its employees, but it denies that the individuals who perform no express work or railroad work other than driving the pickup and delivery vehicle are its employees.[111]

At the oral argument on October 6, 1954, it was stated that the arrangements made between the joint agents and the individuals who operate the joint agent's truck in performing express pickup and delivery work, but who perform no railroad or other express work, have varied 3703 greatly from agency to agency (48 O. A., 117-119).

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[110] It should also be noted that even though the service may be casual, intermittent or seasonal, the crediting of such service may be important to the individual performing the service. Thus if he has less than ten years of service covered by the Railroad Retirement Act the service may be credited toward benefits under the Social Security Act at the time of his retirement, and if he dies before retirement his service credits under the railroad retirement and social security systems will be combined in adjudicating any benefits due his survivors.

[111] Although the Express Agency has limited its concession as to employee status to those performing "platform work" or "railroad work" in addition to the pickup and delivery work, it is apparent that individuals who might perform only clerical work at the agency in addition to the pickup and delivery work would also be considered employees. This is indicated by the Express Agency's statement that those who do "no" express work or railroad work other than driving the pickup and delivery vehicle are not employees. It would naturally follow from this that individuals performing any express work at the agency in addition to driving the pickup and delivery vehicle, would be considered to be Express Agency employees.

Both the Express Agency, and the Telegraphers who represent the joint agents, have urged that the status of these individuals depends, in each instance, on the facts of the individual case, and that no general over-all ruling as to their status under our Acts should be made in this report (48 O. A., 117-119). The Examiner concurs in these views, and makes no findings of fact or recommendations regarding the status of individuals who perform express pickup and delivery work in vehicles owned by the joint agent, but who performs no other railroad or express work in addition to such pickup and delivery work. Similarly, no opinion is expressed regarding the status of individuals who perform express pickup and delivery work in their own truck under an agreement with the Express Agency or the joint agent, as the case may be.

(3) Caretaker or custodian agents.[112]

The Express Agency concedes that individuals who are employed by a railroad as the caretaker or custodian of its station, and who also serve as express agent, are employees of the Agency with respect to such express work if the express work is performed on premises under railroad or express control through ownership, lease or some other arrangement.[113] If, however, the caretaker or cus-

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[112] The previous discussion regarding the status of individuals assisting the joint agent would be equally applicable to individuals assisting a custodian or caretaker agent in performing his express work.

[113] In discussing the duties of a caretaker or custodian agent for the Colorado and Southern Railway Company at Grenville, New Mexico, the Supreme Court of that State said in *Petition of Town of Grenville*, 119 P. (2d) 632 (1941), at page 635:

> "The railway company does not propose to abandon its station at Grenville, but agrees to place in charge thereof a caretaker who will, with his family, reside in

todian performs his express agent work on premises not under railroad or Express Agency control the Agency considers him to be an independent contractor and hence not an employee of the Agency.

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the living quarters of the station, and who will be required to give preference to the necessary railway work in caring for the business. He will be a man with a wife whose services will be available during the caretaker's absence. He will have definite duties which (with the assistance of his wife) will be to keep the station open and heated for the use of railway patrons, during the same hours it is kept open at this time by an agent; to meet the passenger trains; to order cars for shippers by telephone through the agents at Mt. Dora or Des Moines, and to see that such orders are filled; to bill out shipments in the name of the billing agent at Mt. Dora or Des Moines, according to the direction in which the shipment moves; to notify the chief dispatcher of such shipments, who will have the train conductor pick up the cars and have them properly billed; to deliver in-bound less than carload shipments to consignees, practically the same as with an agent, except the charges must be prepaid; to receive cream and other local freight, give receipts therefor, binding on the railway, load it and return empty cans; to act as agent for the express company and deliver express in the same manner as at present; to obtain information for shippers as to when their cars and trains will arrive; take care of livestock and perform duties of that sort; notify consignees of the arrival of their cars, by mail if in the country; 'take care of people, give good service and do the work right.' The custodian's wife will represent him when he is absent from the station and will give receipts for freight and cream. All in-bound freight will come prepaid and will be placed by the train crews at proper places for unloading. Owners will be notified, and therefore will expect the freight and be ready to unload it. Less than car loads of freight will be placed in the warehouse under lock and key and delivered by the custodian to the consignee. No agent will be needed to sell tickets as fare can be paid on the trains at no extra cost."

3704 As was pointed out in the case of the joint agents, mere ownership or control of the premises where the work is performed is not determinative of the individual's employee status under our Acts. The record does not show that there is any difference between the express work performed by the caretaker or custodian who performs his express work on premises owned or controlled by the railroad or the Express Agency and a caretaker or custodian who performs his express work in his own store or other business establishment. It follows that the caretaker or custodian agents are "employees" of the Express Agency with respect to their express work, irrespective of whether the express work is or is not performed on premises owned or controlled by the railroad or the Express Agency.

3705 (4) Merchant Agents and their Assistants.[114]

For the purpose of this report the term "merchant agent" is considered to apply to all express commission agents, not otherwise defined, who perform their express work on premises not under Express Agency or railroad control through ownership, lease or some other arrangement, and who are also generally engaged in some other business activity or activities. Included in this group are individuals who may devote some portion of their working time to railroad service other than station agent, caretaker or custodian service, but who performs the express work on premises not under railroad or Express Agency control. The Express Agency contends that all of these individuals are independent contractors.

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[114] The term "merchant agent" is not peculiar to the Express Agency, and has been used in referring to part-time railroad agents. See *Kurn v. State*, 52 P. (2d) 841 (Oklahoma, 1935); *Kurn v. State*, 66 P. (2d) 52 (Oklahoma, 1937), and *Atchison, T. & S. F. Ry. Co. State*, 118 P. (2d) 202 (Oklahoma, 1941). Similarly, in the 1948 hearings it developed that some railroads have agents who are referred to as 'merchant agents" and who are reported by them to the Board as "employees". For examples of railroad merchant agents who are also listed as express merchant agents in the Express Agency's merchant agent exhibits (Exhibit XXXI, A, B and C) see the 1948 hearings, page 683 (David John Bunyard); page 686 (William Emmett Cooper); page 693 (Rufus Maze), and page 703 (William C. Fitzpatrick).

The Express Agency states that the merchant agencies are located in small communities where the cost of operating its own agency is not warranted by the amount of business done throughout the year, and where it has been unable to secure the services of a joint agent (48R, 9).[115]

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[115] Like the Express Agency, the Western Union Telegraph Company, in addition to making arrangements with various railroads, has also arranged to establish offices or agencies in various business establishments such as hotels, drug stores, bus stations, clubs, etc. *Western Union Tel. Co.* v. *McComb*, 165 F. (2d) 65 (C.A. 6, 1947), cert. den, 333 U. S. 862 (1948); *United States* v *Western Union Telegraph Co.*, 53 F. Supp. 377 (S. D. N. Y., 1943). In the latter case the Court, in discussing the nature and history of the telegraph business, said at page 382:

> "In a consideration of the instant case the nature and history of the business in which the defendant company is engaged must not be lost sight of. As to this Mr. White (President of Western Union) testified (Rec. P. 446 *et seq.*) '* * * The telegraph business is peculiar in this respect, if not in many others: you cannot enter the telegraph business in one place. You have to be in more than one place. If you are going to give the service that these large offices require, or that the patrons require, the public require, you must necessarily reach the place that they want to reach, and these little places all over the country cannot be thought of entirely from what business they take in. They have to be thought of also in the light of what business they distribute, what business they handle for the people in their immediate vicinity. And the fact that the company can provide that kind of distribution makes the larger office more or less possible * * * the little office does not do a great deal of business, and many of them do very little, but if you set up to do a nationwide service, and expect to do a nationwide service the coverage is some-

It adds, however, that in some cases the merchant 3706 agents do handle a comparatively large amount of express business along with their other business, and in explanation of this it states that "In such cases Railway Express has been represented in the particular locality for a long period of time by a merchant agent and circumstances in that town have been such that both the townspeople and Railway Express have been best served by that arrangement." (48R, 12). Other reasons for engaging merchant agents were stated by General Auditor Gross in the 1938 proceedings as follows:

> "A review was made to develop the reason for engaging merchant agents to represent the express com-

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thing that has to be considered. * * * Certainly the country west of the Alleghenies, and more particularly west of the Mississippi developed along the railroads, and the telegraph grew along with the railroads, and the telegraph was in many of these localities long before the locality was much itself. It was the only means of communication at that time, that is fast communication, and there would have been no way, that I can think of, where these communities or the nation or the country would have been served had they not had some arrangement similar to the one that the railroads now have, because there was no other way that they could have economically justified them. It was a natural partnership, it was a natural growth, one fitted into the other's picture, and it remained that way from the very beginning'."

"It is conceded that if it had not been for their railroad contracts the defendant company would have been unable to provide telegraph service to the many thousands of small places throughout the United States which could not support an independent telegraph office and that these small communities must be served if it is desired to furnish an adequate telegraph service."

(In many respects President White's remarks regarding the nature and history of the telegraph business are applicable to a discussion of the nature and history of the express business.)

> pany. The reasons found were many. Of the 1082 merchants referred to hereinbefore, 502 agencies of the express company were at some time represented by an individual also representing the railroad company. In the majority of those cases, merchant agents were engaged by the Railway Express Agency after the railroad agencies were discontinued. In some cases the railroad agents were unable to provide pick-up and delivery service, or for some reason they could not handle express traffic. In some cases railroad agents were not interested in handling express traffic. In some cases the railroad offices were so far removed from the business section of the locality. Many other reasons were the causes of the discontinuance of the 3707 join arrangement. Where at some time the arrangement had been joint, it was found there were no railroad agents and in some cases, no railroad service. In some cases railroad agents have refused to handle express traffic. In many cases merchant agents were engaged to provide satisfactory and convenient service to our patrons." (38R, 8).[116]

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[116] An entirely different reason for engaging merchant agents to replace joint agents, is indicated in a case handled by the Third Division of the National Railroad Adjustment Board (Docket No. T.E.—1457, Award No. 1466, Volume XIII, p. 190). That case involved a claim by the Order of Railroad Telegraphers that the New York Central Railroad Company had arbitrarily agreed with and permitted the Express Agency to remove joint agents from their respective express agent positions at certain localities along the lines of the railroad. In each case the express work which had been removed from the joint agent was turned over to a merchant or other local business man. In their statement of claim the Telegraphers stated, at page 192:

> "When the reason for such action was requested the route agent responded that it was being done because of 'activity' of The Order of Railroad Telegraphers in demanding an agreement with the Railway Express Agency, Inc., to govern the employment and compensation of all joint railway-express agents in the United States, and in incorporating in such demands, unrea-

Another reason for engaging merchant agents, and in fact for engaging any commission agents, is indicated in the following excerpt from the Oral Argument on October 6, 1954 (48 OA, 122):

> "Examiner Funk: * * * Another thing, Mr. Long, in referring to Agent Horton as Mayor Horton, do you attach any special significance to the fact that he is the mayor?
>
> "Mr. Long: No, it only goes to show that we solicit the best people to represent us.
>
> "Examiner Funk: I notice from The Express Messenger that a number of express people have held elective offices of various kinds.
>
> "Mr. Long: Yes, that is true. It is important to us that we have public-minded people as our agents.
> 3708 *They are able to get business for us; that is another reason why we use merchant agents, and another rea-*

> sonable requests upon the Express Agency. Thus, according to these route agents, the Express Agency was adopting a general policy to remove such employes from their positions as express agents." (The testimony in the Telegrapher's claim was supported by the sworn statement of four joint agents.)

In its opinion the Board said, at page 232:

> "This claim is based upon the arbitrary manner in which this Railroad Company permitted the Railway Express Agency, Inc., to remove these agents from their respective express agency positions without just cause thereby arbitrarily reducing the average monthly compensation in the amount of the express commissions they would have earned had they not been thus removed. The record clearly shows that there was no reason or cause for removing these agents with the exception of the one at Brewster which shall be referred to later in this opinion; that they had satisfactorily performed their work; that the local merchants appointed to take their places received the same commission. The carrier does not concede that these agents were arbitrarily removed but it does not deny it. A fair reading of this record convinces us that they were arbitrarily removed."

> *son why we use commission agents too, because their income depends upon the commission, and we hope, and believe, that they get more business than a man who is paid on an hourly basis".* (Emphasis supplied.)[117]

As previously pointed out, the merchant agents, on entering the express service, generally sign the same "Application for Employment", including, prior to 1945, the same "Application for Fidelity Bond and Agreement as to Losses by Negligence and Defalcation", and the same

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[117] In this, and other respects, the instant case differs from *Party Cab Co.* v. *United States of America,* 172 F. (2d) 87 (C. A. 7, 1949), referred to at page 58 of the Express Agency's main brief. In that case the drivers paid the company $8 for the use of a cab during the day shift and $9 for its use during the night shift, and also paid for the oil and gas used by them in operating the cabs. The company provided all necessary licenses, personal injury insurance, and paid for such expenses as maintenance, upkeep, etc. The taxi company had no interest in the amounts which the drivers earned while operating the cabs, and required no reports from them as to such earnings. What they took in was theirs. The drivers had no business telephones, and, although they did so, they were not even required to accept calls received in the company's office. Their principal business was derived from cruising the streets of the city. Their services were rendered directly to the public, and the public received the benefit of such services and compensated them therefor. As the court said at page 93: "In fact, the relation between the plaintiff and the drivers appears more like some kind of joint venture, wherein the plaintiff provides the facilities for a fixed charge and the drivers contribute the fuel, their skill, energy and labor." *Compare*: *Martin* v. *Wichita Cab Co.*, 170 P. (2d) 147, 152 (1946). In that case the Supreme Court of Kansas referred to the relationship existing between a taxi company and its drivers as that of a "contractor and contractee akin to a bailment." In this respect the holding in the *Martin* case is similar to the ruling in *McColligan* v. *Pennsylvania R. Co.*, 63 A. 792 (Penn., 1906), referred to at page 52 of the Express Agency's main brief.

Form 95, as are signed by the exclusive commission and joint agents.

The express work performed at the merchant agencies, like that performed at the exclusive commission and joint agencies, is an integral part of the regular transportation service which the Express Agency offers to the general
public on a nationwide basis.[118] It includes the re-
3709 ceipt and delivery of express shipments, including
valuable shipments; handling of such shipments to and from trains; collection of transportation charges, making necessary remittances and reports,[119] etc. and, in some

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[118] As such, the express merchant agents are more like the individuals discussed in *Western Union Tel. Co.* v. *McComb*, 165 F. (2d) 65 (C. A. 6, 1947), *cert. den.* 333 U. S. 862 (1948) (telegraph agents); *King* v. *Southwestern Greyhound Lines*, 169 F. (2d) 497 (C. A. 10, 1948) *cert. den.* 335 U. S. 891 (1948) (bus depot or station agent); *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52 (W. D. Mo., 1946) (terminal operator of a bus depot); *Caradonna Broker Application*, 21 M. C. 252 (1939) (ticket seller for several bus companies), and *Internal Revenue Bulletin*, Cumulative Bulletin 1937-2, page 382 (individuals operating telephone exchanges), than the individuals discussed in such cases as *Williams* v. *United States*, 126 F. (2d) 129 (C. A. 7, 1942) *cert. den.* 317 U. S. 655 (1942) (musicians) (Express Agency's Main Brief, p. 52); *Dimmitt-Rickhoff-Bayer Real Estate Co.* v. *Finnegan*, 179 F. (2d) 882 (C. A. 8, 1950) *cert. den.* 340 U. S. 823 (1950) (real estate salesmen) (Express Agency's Main Brief, p. 49); *Underwood* v. *Commissioner of Internal Revenue*, 56 F. (2d) 67 (C. A. 4, 1932) (engineers and supervising architect) (Express Agency's main brief, page 52), and *Ozark Minerals Co.* v. *Murphy*, 51 N. E. (2d) 197 (Ill., 1943) (prospectors, miners and drillers of silica) (Express Agency's main brief, p. 62).

[119] With regard to remittances, Superintendent of Organization Lace, in answer to questions by the Telegrapher's attorney, Mr. Hassenauer, testified as follows (48R, 273-274):

> Q. "Can you tell me, Mr. Lace, just what practice was adopted by merchant agents— For example, this

instances, selling financial paper and performing express pickup and delivery work.

The merchant agents are paid on a commission or commission-plus basis. For example, Agent Horton, 3710 Nauvoo, Illinois, was paid a 10% commission, plus 10¢ a pickup and delivery; Agent Barns, Sparta, Illinois, was paid a 10% commission, plus a 7% commis-

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> man Simpson with whom you dealt considerably in your testimony, makes remittances to Railway Express Agency of the monies collected by him in the handling of express?
>
> A. "Your question is just how is it taken care of?
>
> Q. "Yes, sir.
>
> A. "We supply what we term remittance envelopes. The merchant agent places the money in the envelope, addresses it to our assistant treasurer, and obtains a receipt for the envelope from the messenger or trucker who serves his office. I might qualify that, that in some few instances, where perhaps the only service to the town is a freight line, some agents are *permitted* to send their remittances by U. S. Mail. Those, of course, are instances where the amount of business is very, very small and consequently the amount of the remittance is very small." (Emphasis supplied.)

With respect to the handling of funds at the merchant agencies, Superintendent Huff, in answer to questions by the Express Agency's attorney, Mr. Hartung, testified as follows (38R, 32-33):

> Q. "What are the requirement of the Railway Express Agency with respect to the handling of the funds by merchant agents, more particularly with respect to the safety of those funds while in their possession?
>
> A. "*The General Rules and Instructions were universally applied to all points*, and remittances that are be exercised with all funds and remittances that are made to the Assistant Treasurer at specified intervals. (Emphasis supplied.)
>
> Q. "Is there any particular limit put upon the amount of funds which the merchant agent is *allowed* to have in his possession overnight belonging to the Railway Express Agency in the offices listed in Exhibit 6-A? (Emphasis supplied.)
>
> A. "I should say that nearly all of these were on

sion for pickup and delivery, $10.00 a month for meeting a train after regular working hours, and a $10 a month rental allowance for the use of certain space; Agent Schreiber, Tell City, Indiana, was paid a 10% commission, and Agent Westfall, Newberry, Indiana, was paid a 15% commission.

Except with respect to the handling of express shipments to and from trains,[120] and in performing pickup and delivery work, the merchant agents usually perform their express work on their own premises.[121] While there is no written agreement specifying what if any, equipment or supplies are to be furnished, the Express Agency usually furnishes the merchant agents with a set of tariffs, forms for the receipt of express shipments, the receipt of transportation charges, the delivery of shipments, waybill

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a five dollar limit, and that applies to all offices. *All offices have a limit of cash to be kept on hand.* (Emphasis supplied.)

Q. "In the event there was no banking institution in any of these towns, what would he be required to do with any funds in excess of five dollars?

A. "In some cases they take it home with them; in other cases they no doubt conceal it in their stores somewhere, as they do their own funds, protecting them in a similar manner, or lock them in their own safe."

[120] Merchant agencies are sometimes located close to the railroad station. For example, Alberton, Maryland (across the road from the station); Bedington, West Virginia (perhaps a block from the railroad station); Greenmount, Maryland (across the street from the station); Hokes, Pennsylvania (adjacent to railroad station), and Newville, Pennsylvania (about two blocks from the station).

[121] In some instances the merchant agent is employed in some other capacity by a person or company other than the Express Agency or a railroad, and performs his express work on the premises of such other employer.

forms, abstract of prepaid shipments forms, forms for statement of receipted collect business, and any other necessary forms. The Express Agency also generally furnishes the merchant agent with at least some of the equipment used in the performance of his express work.[122]
3711 Scales and trucks furnished by the Express Agency are maintained by it at its own expense and, whenever necessary, are replaced by it.

The express service rendered at the merchant agencies is generally performed during normal business hours, but train schedules may require the performance of express work outside those hours.

Although the merchant agents are official representatives of the Express Agency in their respective communities, and are responsible for the operation of their agency, they, like the joint agents, for example, do not always perform all of the express work at the agency themselves, and often have other individuals, including relatives, assist them in the performance of their work.[123]

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[122] The equipment and supplies furnished the merchant agents apparently varies somewhat at the different agencies. For example, Agent Horton was furnished with tariff books, address cards, 2 sets of scales, forms, and wrapping paper; Agent Burns was furnished with a safe, two platform trucks, a flat top desk, a chair, a revolver, stationary cabinets, and other supplies for operating an agency; Agent Schreiber was furnished with printed forms, sealing wax, glue, and a metal stamp; Agent Westfall was furnished with a chest of drawers, forms, and a scale, and Agent Jordan was furnished with two scales, a safe and forms.

[123] All of the commission agents who testified in the 1948 hearings stated that they performed some express work, although two of them, Agents Jordan and Schreiber, testified that they actually did very little express work themselves. Likewise, all of these commission agents stated they were assisted by others in the performance of their express work.

The merchant agents, like the joint agents who have been
conceded to be employees, are not granted paid vacations,
pension rights, free transportation, or the privilege of ob-
taining group insurance, by the Express Agency. Neither
do they acquire any seniority rights in the express serv-
ice. They are not reported to the Interstate Commission
on the Interstate Commerce Commission Form entitled
"Statement of Employees' Service and Compensation for
the Calendar Year ." As in the case of the joint
agents, for example, there is no specific ruling by the In-
terstate Commerce Commission as to whether merchant
agents should be reported on this form. This form re-
quires the Express Agency to report, with respect to each
class of its employees, the number of employees, the num-
ber of straight time and overtime hours of service, and
the amount of compensation for such service. The
3712 Express Agency does not keep a record of the hours
of service of its commission agents. Because this form
calls for a statement based on a record of hours of straight
time and overtime, and because no such record is kept
by the Express Agency with respect to merchant agents,
it has concluded that such agents are not within the scope
of the term "employee" as used in the title of the form, and
therefore has not reported them to the Interstate Com-
merce Commission on that form, but has reported their
compensation under a separate operating expense account.

When merchant agents are engaged to operate an express agency they are instructed as to the work to be performed. For example, Agent Schreiber stated that it was his recollection that when he started out as express agent the route agent spent two days with him and instructed him how to do the express work.[124] As pre-

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[124] Agent Harrison, Rockville, Indiana, listed by the Express Agency as a merchant agent in Exhibits XXXI-ABC, but later eliminated from the Express Agency's claim (48R, 389), because the "express office was on premises

viously pointed out all commission agents, including merchant agents, are generally given a copy of the Express Agency's "General Rules and Instructions". They also receive from time to time, various bulletins or circular letters relating to the performance of their express work some of which refer to specific changes in the rules and instructions. In the 1938 hearing Superintendent Huff testified, at page 19, that it was essential for merchant agents to know the provisions of these rules and regulations insofar as they relate to their service for the
3713 Express Agency, and, at page 32, that: "The principal application of the general rules and instructions to joint and merchant agents is to meet requirements of the law and to permit safe transportation of express matter." While the Express Agency contended in the 1948 hearings that only those rules and instructions which are in the nature of specifications of the work apply to merchant agents, it admitted that certain of the rules and instructions must be complied with in order for the Express Agency to comply with the Interstate Commerce Act, and that it requires a certain standard of its agents as to the marking of shipments in order to provide for expeditious transportation and prompt delivery.

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rented by Railway Express Agency, Inc." (48R, 389) testified at pages 122-123:

> "I started with the old Adams. When Mr. Colal (former agent) became too old to run the business, he brought this route agent, Mr. Smith at Logansport—he had been asked to pick some young man to take over the office. Mr. Colal called me up and told me to come to his office and talk to him. I was a farmer out on a farm, I came in and took the job—that was on Saturday—and started in the office on Monday, with Mr. Colal staying in the office to teach me the business for thirty days, and I kept his girl he had in the office to help with the office work. She stayed with me until she died. That was in 1921. My wife has been helping me ever since."

In the discussion regarding the joint agents it was pointed out that in the 1937 and 1938 proceedings the Express Agency contended that the relationship existing between it and the merchant agents was exactly the same as the relationship existing between it and the joint railroad-express agents. Thus, in the oral argument before Examiner Schoene on January 17, 1938, Mr. Hartung, General Solicitor for the Express Agency in those proceedings, stated at page 5, with regard to the joint agents and the merchant agents:

> "*They are required to perform exactly the same duties; they use exactly the same forms, they are required to make the same reports, they are compensated on the same basis.*" (emphasis supplied)

And at page 30:

> "* * * *if you hold that the railroad agent who serves also as an express agent, is an employee of the express company within the meaning of the Railroad Retirement Act, then you must hold likewise that the drayman or that country store-keeper is an employee of the express company.*" (emphasis supplied)

There was nothing in the records of the 1937 and 1938 proceedings to controvert Mr. Hartung's statement as to the similarity between the joint agents and the merchant agents, and the necessity for making the same employee status ruling with respect to both groups, and the Examiner found, and the Board held, that both the joint agents 3714 and the merchant agents were employees within the meaning of the Railroad Retirement Act. Likewise, the evidence of record in the 1948 proceedings does not indicate the existence of any substantial differences between the joint agents and the merchant agents, insofar as their relationship to the Express Agency is concerned.[125]

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[125] The factual differences between the merchant agents and the joint agents which appear to merit any consideration are (1) in some instances the merchant agents are

As previously pointed out, the joint railroad-express agents are "employees" of the Express Agency with respect to their express work, and since there are no substantial differences between the joint agents and the merchant agents, insofar as their relationship to the Express Agency is concerned, it would naturally follow that the merchant agents are also "employees" of the Express
3715 Agency within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts.

Although, as pointed out above, there are, in fact, no substantial differences between the joint agents and the merchant agents, insofar as their relationship to the Express Agency is concerned, the Express Agency contends, at page 10 of its main brief, that "There are many differences in the relationship to Express Agency of the exclusive commission agent, the joint agent, the 'sports' and the merchant agent." (The agents referred to as "sports" includes those who have been referred to in this

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said to be companies, corporations, or partnerships, rather than individuals, and (2) the merchant agents are generally engaged in other business activities and perform the express business on their own premises, while only some of the joint agents are engaged in other business activities, and only a few of them apparently perform their express work or both their railroad and express work, as the case may be, on their own premises. Although the Express Agency states that some of its merchant agents are companies, corporations or partnerships, it appears that at each agency, the Express Agency has reported some individual to the Board as the express agent. Thus, only individuals are listed in the merchant agent Exhibits XXXIABC. In this connection, it may also be noted that in his Second Report, page 34, Examiner Schoene stated that "a few (twelve) of the merchant agents may be companies, rather than individuals". Aside from this, however, the mere fact that an agreement is made with a company rather than with an individual would not, of course, necessarily prevent individuals rendering service under the agreement from being employees. Indeed, in the case of *Adams Express Company* v. *Schofield*, 111 Ky. 832, 64 report as "caretaker or custodian agents" and as "other commission agents", and for the purpose of discussing these alleged differences they are referred to simply as "other" agents.) In its brief, pages 10 to 12, the Express Agency has outlined what it considers to be the "principal differences" in the relationship to the Express Agency of these various groups of agents, and these will be discussed below in the numerical order in which they appear in the Express Agency's outline.

1. "Has Express Agency Considered Agent as Employee?"

Although the Express Agency states that only the exclusive commission agent has been considered to be an employee, such a statement by it is, of course, not determinative of the status of express agents under the Railroad Retirement and Railroad Unemployment Insurance Acts. As previously pointed out, the true test under our Acts is whether the Express Agency has the right, irrespective of whether such right is actually exercised, to supervise and direct the manner of rendition of the service.

S. W. 903 (1901) a firm, Owens and McKinney, acted as agent for the Adams Express Company and also furnished a horse and driver for the handling of express shipments. This agent apparently was a merchant agent. The court held that the agent and the driver were employees of the Express Agency. As previously pointed out, the facts that merchant agents are generally engaged in some outside activity of their own and generally perform their express work on their premises, are not determinative of their status under our Acts. If being engaged in some other business activity would prevent a merchant agent from being an employee of the Express Agency, it would likewise prevent the exclusive commission and joint agents, who are engaged in outside business activities, from being employees; yet, the Express Agency concedes that all of its exclusive commission agents are employees, and that all of its joint agents who perform their express work on premises under railroad or Express Agency control are employees.

Moreover, the Express Agency conceded, during the 1948 hearings, that the joint railroad-express agents were its employees, although it later qualified that statement as applying only to joint railroad-express agents who perform their express work on premises under railroad or Express Agency control through ownership, lease or some other arrangement. Similarly, it also conceded that
3716 all commission agents who perform their express
work on premises under railroad or Express Agency control are employees. As previously pointed out, ownership or control of the premises where the work is performed is not determinative of an individual's employee status under our Acts. Moreover, the evidence of record does not disclose any substantial differences as to the relationship existing between the Express Agency and its joint agents, and that existing between the Agency and its merchant agents, insofar as their relationship to the Express Agency is concerned.

2. "Is Agent on Seniority Roster?"

The Express Agency states that only the exclusive commission agent is carried on its seniority roster; that the joint agent is carried on the railroad's seniority roster only, and that the merchant and "other" agents are not carried on any seniority roster. With respect to the exclusive commission agents, however, it should be noted that in defining the exclusive commission agents who come within the Express Agency's Category 2(c) the Express Agency specifically states, at page 7 of its main brief, that "These agents are not subject to the Rules Agreement with The Clerks, and their positions are not subject to bid and are not placed upon a roster."[126] Moreover, it was

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[126] This would indicate that if an agent is not carried on the Express Agency's seniority roster, it is merely due to the fact that he is not subject to the Rules Agreement with the Clerks; this, of course, is not evidence that he is not an employee of the Express Agency.

testified at the hearing; that the exclusive commission agency is usually operated by only one man, and that exclusive commission agents are carried on the seniority roster "at the office."[127] Aside from the fact that neither the joint agent nor the merchant agent have any
3717 seniority rights, insofar as their relationship with
the Express Agency is concerned, it appears that some exclusive commission agents may not have any seniority rights with the Express Agency either, and that the rights of certain other exclusive commission agents, being limited to the office where they are the only employee, may not amount to very much.[128]

3. "Who Supplies and Controls Premises in Which Agency Is Operated?"

The Express Agency states that the Express Agency supplies and controls the premises in which the exclusive and the "other" agencies are operated;[129] that the railroad supplies and furnishes the premises where the joint agency is operated,[130] and that the merchant agent furnishes the premises used in the operation of his express agency.

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[127] In this connection see the following excerpts from the Oral Argument held on October 6, 1954, p. 43:

"Mr. Long: What would the seniority district be in the case of these exclusive commission agents?
Mr. Morgan: It would be just at the Agency.
Examiner Funk: If it is a one man agency?
Mr. Morgan: Yes.
Examiner Funk: It wouldn't mean very much then would it?
Mr. Morgan: Not a whole lot.
Examiner Funk: In other words, if there is a one man agency, and that agency is discontinued, the agent wouldn't have any rights elsewhere?
Mr. Morgan: Not a whole lot."

[128] In this connection it may be noted that although he salaried agents are all conceded to be Express Agency mployees, those occupying excepted positions are selected y the Express Agency without reference to seniority, and uch positions are not bulletined.

[129] In this connection it may be noted that Superin- endent of Organization Lace, in testifying, at page 249 of

As previously pointed out the Express Agency considers that ownership or control of the premises where the Agency is located is the dividing line between the status of an employee and that of an independent contractor. Thus, Mr. Long stated at the oral argument on October 6, 1954: "The dividing line, as we have conceived it for practical administration purposes, is who controls the premises upon which the agency is conducted?" (48 O. A., 50.)

Aside from the fact that, as previously pointed out,
3718 there is no legal basis for this contention,[131] there is
a serious question whether such a dividing line would be practicable or desirable from the standpoint of good

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the 1948 hearings, that the principal difference between the exclusive commission agent and the merchant agent was that the Express Agency "usually" furnishes the premises for the exclusive commission agency, also stated that "There are some very few exceptions to that."

[130] In the 1937 and 1938 proceedings the Express Agency contended that the joint agent, like the merchant agent, actually furnished the premises used in the operation of the joint agency (see for example, 37 O. A., 12). While this contention has not been repeated in the 1948 proceedings, it may be noted, however, that the Express Agency itself does not furnish or control the premises used by either the joint agents or the merchant agents.

[131] In this connection it is interesting to note that in *Western Union Tel. Co.* v. *McComb*, 165 F. 2d 65 (1947) *cert. den.* 333 U. S. 862 (1948), the Court of Appeals for the Sixth Circuit said at page 71:

> "Certainly, workers in an agency office of the telegraph company are not withdrawn from coverage of the Fair Labor Standards Act for the reason that some of them are engaged in local retailing work in addition to telegraphic work, or because of the location of the telegraph office in a retail or service establishment."

administration. For example, take the case of agent T. H. Whitsel at Mount Union, Pennsylvania. In the 1938 hearings Express Agency Superintendent Huff testified with regard to Mr. Whitsel as follows:

> "At Mt. Union, Pennsylvania, an office on the Pennsylvania Railroad Company, we were advised by the railroad company that it had changed its agent's plans and he could no longer look after the present business, so T. H. Whitsel, who was acting as drayman and delivering business in the town and transferring between the Pennsylvania Railroad and the East Broadtop Railroad and Coal Company, was employed as agent and has acted for a number of years. The railroad company gave him a portion of the former baggage room adjacent to their station in which he installed a desk and on the outside wall placed a sign. He also maintains an office in his home which is about six blocks from the railroad station." (38R, 23.)

In the 1948 proceedings it was stated that Mr. Whitsel was "not properly classified" as a merchant agent, and that he had been eliminated from the merchant agent exhibits because "The express office was on railroad premises and not controlled by the agent." (48R, 389.) If we were to accept the Express Agency's contention that the mere ownership or control of the premises is determinative of the agent's status it would mean that if Mr. Whitsel should remove his express agency from the office in the station and instead handle the express business from the other office which he maintains in his home, he would automatically cease to be an employee, but that if some months
3719 or years later he resumed operation of the express
agency in the station he would automatically become an "employee" again. Similarly, if agent Harrison, Rockville, Indiana, who has been eliminated from the merchant agent exhibits because "The express office was in premises rented by Railway Express Agency, Inc." (48R, 389)

should move his agency to a location where he has to pay the rent, or if the Express Agency should stop paying the rent and tell him he would henceforth have to pay his own rent, he would automatically lose his employee status. However, if he later moved the office to the railroad station, where he was once located, or to some location where the Express Agency would pay the rent, or if he persuaded the Express Agency to resume paying rent on the premises he now occupies, he would automatically regain employee status.[132] Obviously, to permit employee coverage under our Acts to change merely because the agent had moved to or from premises owned or controlled by a railroad or the Express Agency, or because the Express Agency decides to pay or to discontinue paying rent on the premises occupied by the agency, would be neither administratively practical nor legally defensible.

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[132] A somewhat similar situation may have occurred at Gaylord, Michigan. In the 1948 hearings it was stated, at page 389, that L. H. Henderson and E. I. Lynch "were not properly classified" as merchant agents because the express office was "in premises rented by Railway Express Agency, Inc." In Exhibits XXXIABC Mr. Lynch is listed as agent at Gaylord from January 1, 1937, through October 31, 1943, and from February 14 through December 31, 1947, and Mr. Henderson is listed as agent there from November 1, 1943 through February 13, 1947. During the latter period Mr. Lynch is listed as one of agent Henderson's assistants. For the reasons stated above, the Express Agency corrected its merchant agent exhibits to eliminate therefrom the service and compensation of Messrs. Lynch and Henderson effective November 1, 1943. However, it did not eliminate therefrom Mr. Lynch's service and compensation as agent prior to November 1, 1943. Similarly, the service and compensation of one of agent Lynch's assistants, O. L. Cook (S. S. A. No. 711-16-2913), during the period prior to November 1, 1943, was not eliminated, but Mr. Cook's service and compensation as an assistant to agent Henderson after November 1, 1943, was eliminated from the exhibits.

4. "Who Determines Where Agency Is to Be Located?"

The Express Agency states that at the exclusive commission and merchant agencies the agent determines where the agency is to be located; that the "other" agents usually determine where their agency is to be located, but that at the joint agency the railroad and the Express Agency determine where the agency is to be located. This 3720 would merely indicate that to some extent, at least, the exclusive commission agent (an admitted employee) and the merchant agent (an alleged independent contractor) have more freedom of action than the joint agents who are conceded to be employees of the Express Agency. However, since the freedom of action accorded the merchant agent in this respect is no greater than that accorded the exclusive commission agent, an admitted employee, it is clear that this is not a factor which would tend to indicate that the merchant agents are not employees of the Express Agency.

5. "Who Determines Who Shall have Right of Entrance to Agency?"

The Express Agency states that it determines who shall have the right of entrance at the exclusive and the "other" agencies; that the railroad determines who shall have the right of entrance at the joint agency,[133] and that the mer-

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[133] In this connection, it is interesting to note the following excerpts from the transcript of the Oral Argument held on October 6, 1954, pages 43-44:

> "Examiner Funk: Who determines who shall have the right of entrance to agency?
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> Mr. Long: Because we rent the premises, or own the premises, we would. The same is true with respect to people like Harrison where we pay the rent; we have the right, the primary right, to entrance and use.
>
> Examiner Funk: The Express Agency's offices are public offices where people go to ship packages. Would the Express Agency have the right to prevent an or-

chant agent determines the right of entrance at the
3721 merchant agency.[134]

It is reasonable to assume that any express agent, irrespective of what he may be called, who operates his own business in the same place that he also operates the express agency might not wish to permit entrance to the premises after regular working hours unless he could be present. For example, a jeweler having valuable merchandise on display, or a druggist who sells narcotics, might reasonably be ex-

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dinary citizen from going into one of its offices for that purpose?

Mr. Long: I didn't think that was going to come up in this case, but there is nothing in the law which requires Express Agencies to maintain an office during given hours. We do have an obligation of furnishing express service in communities. That obligation is regulated by the usual State Commission. We could not discriminate amongst patrons who come there, I will grant you that.

Examiner Funk: I am trying to ascertain what the item actually means.

Mr. Long: It means this. When the Express office is closed, a division supervisor, even though he may come around there at eight o'clock at night, has the right to go in there—he doesn't where there is a merchant agent.

Examiner Funk: Are you then referring to a situation arising outside of the regular working hours?

Mr. Long: No, I am speaking with respect to the right to entrance to the agency at any time. I am talking about who determines who shall have the right of entrance to the agency. The merchant agent could close his agency during the daytime, in that event we would have to look for another agent, but we would lose the use of his agency."

[134] It should be noted that the Express Agency does not claim to have any greater voice in determining who shall have the right of entrance at the joint agency than it does at the merchant agency, yet it has conceded, and the Supreme Court of the United States has stated, that joint agents are employees of the Express Agency with respect to their express work. Moreover, it may also be

pected to retain control over entrance to the premises after regular working hours. However, the retention of such control would be determinative as to whether his relationship to the Express Agency, with respect to his express work, was that of an employee or an independent contractor.

The work performed by all the commission agents is an integral part of the regular daily transportation service which the Express Agency, as a common carrier, offers to the general public.[135] It cannot pick and choose

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noted that, insofar as entrance to the agency by representatives of the Express Agency is concerned, Mr. Lace, Superintendent of Organization for the Express Agency testified during the 1948 proceedings that he believed a route agent would have the right to enter a merchant agency to examine the agent's books during *reasonable business hours.* (48R, 380)—*Compare King v. Southwestern Greyhound Lines*, 169 F. 2d 497, 499 (C. A. 10, 1948) *cert. den.* 335 U. S. 891 (1948) (Station agent for certain Bus Companies held to be an employee within the meaning of the reemployment provision of the Selective Training and Service Act. The agreement between the agent and the Bus Companies provided that "Company representatives were authorized *at reasonable hours* to inspect and check all property belonging to them and to inspect and audit all records and accounts pertaining to their business"). (emphasis supplied).

[135] In 9 Am. Jur., Carriers, §4, p. 431, it is stated that: "The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence he is regarded, in some respects, as a public servant."

Similarly, in *Olive Kent Park v. Moshassuck Transp. Co.*, 71 N. Y. S. 2d 15 (1947), it is stated at page 20 that:

> "The characteristics of a common carrier, gathered from the decisions in many jurisdictions, are well summarized in Section 3, subdivision (b), of Carriers, in 13 Corpus Juris Secundum, in the following words: 'The test by which it is determined whether a party is a common carrier of goods is: (1) He must be en-

3722 as to who among those desirous of using its facilities should be permitted to do so.[136] It must serve the public generally, and it cannot avoid its public duties, or divest itself of the duty to serve the public, by calling certain of its agents independent contractors. As previously pointed out, the merchant agent, like the salaried, exclusive commission and joint agents, is an official repre-

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> gaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation. (2) He must undertake to carry goods of the kind to which his business is confined. (3) He must undertake to carry by the methods by which his business is conducted, and over his established routes. (4) The transportation must be for hire. The distinctive characteristics of a common carrier are those stated in the first text set out above, namely, that he holds himself out as ready to engage in the transportation of goods for hire as a public employment, and not as a casual occupation, and that he undertakes to carry for all persons indifferently, within the limits of his capacity and the sphere of the business required of him'."

To the same effect see *Hilton Lumber Co.* v. *Atlantic Coast Line R. Co.*, 53 S. E. 823, 828 (N. C., 1906), where the Court quoted the following definition from *McDuffee* v. *Railroad*, 52 N. H. 430, 13 Am. Rep. 72:

> "A common carrier is a public carrier. He engages in a public employment and takes upon himself a public duty and exercises a sort of public office. * * * His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right."

[136] In some states failure to transport goods, taking the same in the order presented, would appear to be a violation of state law. For example, see: *Vernon's Annotated Missouri Statutes*, Vol. 20, §390.180, the *Iowa Code Annotated*, Vol. 27, §§486.8 and 486.9.

sentative of the Express Agency in his community.[137] It s inconceivable that the Express Agency could long coninue to satisfactorily perform its public duties as a common arrier if it permitted its official representatives to determine who would be served at their respective agencies
3723 during the hours that such agencies are open for
business.[138] It follows that if the Agency should earn that any agent had denied entrance to a patron of he Agency (who was not disorderly or otherwise legally ndesirable), it would not and could not permit such a ractice to continue, and if the agent continued to deny ntrance to express patrons, it would be necessary for the xpress Agency to get a new agent.

. "Who Determines the Hours During Which the Agency Shall Remain Open?"

The Express Agency states that the Express Agency akes the determination at exclusive commission agencies; hat the railroad makes the determination at the joint

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137. In speaking of an express company's liability for he acts of a local express agent the Supreme Court of lississippi said in *Richberger* v. *American Exp. Co.*, 18 o. 922 (1896), at page 923:

> "An express company does not transport passengers, and cannot be made liable, as a carrier of passengers might, for willful torts committed by its agent on passengers in their transportation; but *it keeps offices for the transaction of its proper business, a business calling to its offices every day thousands of citizens, and in dealing with its customers, in its offices, in its business, it is bound, in Judge Story's language, 'for respectful treatment and for decency of demeanor'.*" (emphasis supplied.)

138. State laws sometimes provide that certain state nployees have the right to enter express offices in the erformance of their official duties. For example, see *est's Louisiana Statutes Annotated, Revised Statutes*, olume 1, Title 3, §1733 (investigation to discover diseased weet potatoes or plants).

agencies, and that the merchant and the "other" agents make the determination at their agencies. Rule 897 of the Express Agency's "General Rules and Instructions" states, in pertinent part, that "Offices must be kept open during customary business hours". The evidence of record in these proceedings indicates substantial compliance with
this rule,[139] and there is nothing in the record to in-
3724 dicate that "customary business hours" were intended
to be other than the normal business hours in the

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[139] Fof example, agent Horton testified that his agency is kept open from 7:00 a.m. to about 6:00 p.m. during the week, and from 9:00 a.m. to 1:00 p.m. on Sundays, but that if someone wanted him to open up the agency after 6:00 p.m. and get them a shipment that he was holding there, he would do so, and that he would also accept shipments after hours. Although Mr. Horton testified that no representative of the Express Agency ever told him when he should open or close the agency, and that he didn't believe he would pay much attention to them if they did, it is obvious, in view of his observed hours of work, and his willingness to handle express outside those regular hours, that the Express Agency would have no reason to speak to him about his working hours. Similarly, although Agent Horton stated that he was never told to get his shipments out at any specified time, he also testified that he intended to maintain the standard of service for which the Express Agency was noted. Mr. Long also interrupted Mr. Horton's testimony at one point to state "We will concede that the Express Agency expects those shipments to be handled in an expeditious manner." (48R, 40). Agent Burns testified that his normal business hours were from 8:00 a.m. to 5:00 p.m., and that he met trains outside those hours. He also stated that he had been instructed by the Express Agency to ship express by "The first route out." (48R, 59). Agent Jordan testified that the normal working hours at his agency were from 9:00 a.m. to 6:00 p.m., and that his agency was closed on Sundays. He added that his agency made deliveries after 6:00 p.m., but that he had never been requested to deliver a shipment on Sunday. Agent Harrison testified that his express office is kept open every day, except Sundays, from 8:00 a.m. to 5:00 p.m. Although his office is closed during the noon hour, he stated that

community. Moreover, the very nature of the express business, and the necessity of coordinating the movement of express shipments with railroad transportation, sometimes makes it necessary that trains be met outside the regular working hours at merchant agencies as well as at other express agencies. Thus, Superintendent Huff of the Express Agency stated at page 27 of the 1938 hearing:

> "Our business moves at all hours of the day and night. The arrival and departure of the trains may not be during the business hours of the merchant or regular working hours of the railroad agent, but the agent must see that shipments are handled promptly. The Railway Express Agency does not require him and it has never been the practice of the Express Agency to require that the agent handle the business himself. He is free to enlist such assistance as he may need, to substitute."

And again at page 28, in answer to the following question,

> "Mr. Huff, you stated that the merchant agents and joint railroad express agents work at hours other than the regular business hours or the regular hours of employment in railroad service. Will you please explain that in a little more detail?"

he replied:

> "In several sections over which I have had jurisdiction, we have handled a great volume of perishable traffic, carloads of strawberries, fish, oysters, and similar commodities moving in L. C. L. quantities, received in the express business late in the day after the regular business hours of mercantile estab-

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he lived just across the street and would make deliveries during the noon hour if requested. He also stated that he would make deliveries on Sunday. Agent Schrieber testified that his agency is kept open from 8:00 a.m. to 8:00 p.m., on week days, and from 8:00 a.m. to 12:00 noon, and 5:00 p.m. to 8:00 p.m. on Sundays. Agent Westfall stated that his express office is kept open from 7:00 a.m. to 9:00 p.m. daily, including Sundays.

lishments and some time after the regular hours of the railroad agent ended. In such cases, that business always has been handled by merchant agents or joint railroad-express agents in the same manner as though the business had been offered during the regular business hours. This is entirely proper, for the agent receives a commission for doing the work at whatever hour the business is offered and very often that commission is very substantial. Of course, this is not true every day in the week, every month in the year. Perishable traffic moves in large quantities in short seasons. Of course, there are occasions of emergency shipments that move in other than regular business, which are handled by joint railroad-express agents and merchant agents, if and when they are received. At certain places we have carload shipments of race horses which usually are received in the very early morning hours before the regular business day, and are often forwarded late at night, and are also received and forwarded on Sundays and holidays, when a merchant agent's store, as an example, would not be open, and in many instances, the railroad station would be closed. These joint railroad and express agents and merchant agents receipt for waybills, or deliver and arrange for collection of charges, and such other work as may be necessary properly to handle the traffic, and of course, receive the usual commission for that business." (38R, 28).

3725 And again at page 36, in answer to the following question, he stated:

"Q. Are merchant agents required to meet trains at certain specified times so that sometimes they are required to handle business beyond the usual or normal working hours of the day?

"A. They are, or those employees who assist them.

"Q. But as a matter of fact, the contract requires them to meet trains at specified times?

"A. They have no option in the matter. They must watch the train schedules. They are interested in their commission, and would not get any business if they did not.

> "Q. If they did not watch the train schedules, you would discontinue the relationship and get someone else who would?
>
> "A. That is right."

Likewise, the Express Agency's Superintendent of Organization, Mr. Lace, testified in the 1948 hearings, in answer to questions from Vice President Morgan of the Clerks, as follows at page 380:

> "Q. Is the merchant agent subject to being governed by the movement of trains, handling express incoming and outgoing at his office? Is he obliged to conform to the movement of those trains, or are the trains subject to his desires in respect to that condition, Mr. Lace?
>
> "A. If part of his duties consist of removing the traffic from the train or putting the traffic on the train, he'd have to be governed by the schedule."

And at p. 382:

> "Q. No. 8 comes in at three-fifty-nine and he [the merchant agent] is the only man there. Is he free to use his discretion as to whether he meets that train at three-fifty-nine or otherwise?
>
> "A. No, he is not.
>
> "Q. What do you mean 'he is not'?
>
> "A. He is not free to use his discretion.
>
> "Q. That is, he must meet No. 8 at that time, if he expects to hold that office. Is that correct?
>
> "A. That's right."

7. "Who Determines Number of Employees Agent Shall Have?"

The Express Agency states that the agent and the Express Agency make this determination at the exclusive commission agencies,[140] that the railroad and the agent

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[140] *Cf.* Wage and Hour Division Opinion Letter by Charles H. Livengood, Jr., Chief of Wage-Hour Section, June 5, 1942, referred to in C. C. H. Labor-Law Reports, 4th Edition, P. 25, 126.62.

3726 make the determination at the joint agencies,[141] and that the merchant agents and the "other" agents

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[141] In this connection it is interesting to note the opinion of the Third Division of the National Railroad Adjustment Board in a claim filed by the Order of Railroad Telegraphers against the Alton Railroad, on behalf of the joint railroad-express agent at Godfrey, Illinois. Award No. 2054, Vol. 18, page 351, at pages 372-373:

"Opinion of Board: Award No. 1173 of this Board involved the question as to who should pay extra help for the purpose of loading express at Godfrey, Illinois, during the asparagus season for the year 1938. That award held that this expense should be paid for by the Claimant and not the Express Agency or the Alton Railroad.

"This claim involves the same question between the same parties at Godfrey, Illinois, for the years 1939 and 1940. The petitioners contend that they have additional evidence than was presented in Award No. 1173. The Board has examined the additional evidence, and finds that it is not materially different than that presented in the previous award and holds that it was the obligation of the Claimant to pay this additional expense for the years 1939 and 1940.

"The Claimant informed the Express Agency that for these two years he would not hire anyone to assist him with handling of the asparagus for these two seasons. The Express Agency then hired a helper. The Claimant contends that the Express Agency had no right to hire this extra help, and if it did, he should not pay for the help. To this contention the Board cannot agree. The agreement contemplated that the Claimant would hire extra help during the asparagus season, and since he refused to, the Express Agency had the right to hire extra help and charge the expense to the Claimant, which it did.

"The claimant did not remit all the money due the Express Agency for the years 1939 and 1940, but deducted the amount he paid to the extra help. In 1941, the Respondent deducted from the Claimant's salary this sum. The Claimant contends that Respondent had no right to do so. He overlooked the fact that the Express Agency was the respondent's agent to handle the express on its system. (See Ar-

3727 make the determination at their agencies.[142] Since the Express Agency states that it has no voice in determining the number of assistants at any of the commission agencies, except the exclusive commission agencies, it is obvious that on this point there is no difference

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ticle XI, Section 1, of the agreement between the Railway Express Agency and the Alton Railroad Company). In effect, this was not money due from Claimant to the Express Agency, but in reality it was the respondent's money. That is to say, the Carrier was entitled to the net revenue received from the Railway Express Agency for express transported over the Alton's system. Therefore, this transaction amounted to a set-off of money due from the Claimant to the Respondent.

"This award should in no way be construed as a precedent for the Carrier, to withhold from an employe's salary a sum of money due a third party. Such practice would not meet the approval of this Board. But here, the money withheld from the Claimant's salary was in reality his employer's money for the reasons explained above. Various states have adequate garnishment laws for third parties to collect from the employer money due from employes' salaries. When an employe owes a third party a sum of money, that party should be forced to resort to the state's garnishment laws."

[142] In connection with this point it is interesting to note the following excerpts from the oral argument on October 6, 1954, pages 44-45:

"Examiner Funk: Item 7, 'Who determines number of employes agent shall have'. You state that the exclusive commission agent and the express agency make this determination at the exclusive commission agency.

Mr. Long: Yes, that is correct, The exclusive commission agent operates his agency on the basis of the commission paid. Generally he pays the expenses of the operation, you see.

Examiner Funk: He pays his own expenses?

Mr. Long: Yes, generally.

Examiner Funk: Does he hire his own people?

Mr. Long: Yes, generally. There are some excepbetween the joint agents, merchant agents or "other commission agents" insofar as their relationship to the Express Agency is concerned.

8. "Is Agent in Line for Promotion in Express Service?"

The Express Agency states that the exclusive commission agents alone are in line for promotion.[143] Aside
3728 from the fact that, according to this statement, the joint and "other" agents, conceded express employees, are, like the merchant agents, not considered to be in line for promotion, it would appear that the exclusive commis-

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> tions; there may be some seniority in that agency too, I don't know.
>
> Examiner Funk: If you are paying him a commission, and he hires the people who assist him out of that commission, is the main thing you are interested in then the work that is being done?
>
> Mr. Long: That is correct.
>
> Examiner Funk: You don't care how many employees he has?
>
> Mr. Long: No, I wouldn't say that. We wouldn't want the man to employee himself out of a living."

[143] Aside from the question of actual promotion from one job to another it appears that in some instances commission agents, other than exclusive commission agents, may in substance be promoted through having their agencies reclassified. Thus, General Auditor Gross of the Express Agency testified that:

> "In some cases it developed that agents had been considered as merchant agents and the classification of the office had been changed to where they may have become joint railroad-express agents or where they may have become exclusive commission agents." (48R. 277).

(In this connection it may be noted that the Express Agency's exhibits list J. G. Krawczyk as merchant agent at Warren, Rhode Island, for the period from January 1, 1937 through February, 1946. However, in the list of the salaried, exclusive commission and contract offices issued by the Express Agency in January, 1953, a Mr. J. G. Krawczyk is listed as the salaried agent at Warren.)

sion agents who fall within the Express Agency's Category 2(c) (see page 7 of the Express Agency's main brief), not having any seniority rights, would also not be in line for promotion in the express service. Moreover, as previously indicated, exclusive commission agents at one man agencies, who have seniority only at that office, would have very little, if any, rights to promotion in the express service. In any event it is clear that, insofar as their relationship with the Express Agency is concerned, there is no difference on this point between the joint, merchant and "other" agents, and very little difference, if any, between these agents and some exclusive commission agents.

9. "Who Selects Substitute When Agent is on Vacation or Away from Agency?"

The Express Agency states that it selects the substitutes at the exclusive commission agency; that the railroad selects the substitutes at the joint agency; that the merchant agent selects his own substitutes, and that the "other" agents usually select their own substitutes. Since the Express Agency states that it has no voice in selecting the substitute at the joint agency, and that the "other" agents usually select their own substitutes, and since it has conceded that both the joint agents and the "other" agents are its employees, it is apparent that this factor is not a point of difference between the joint, merchant and "other" agents, insofar as their relationship to the Express Agency is concerned.[144]

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[144] In some instances, moreover, it appears that the Express Agency may have selected the individual who substituted for the merchant agent. For example, J. L. Steinkirchner is listed in the Express Agency's exhibits as the merchant agent at Listie, Pennsylvania, from January 1, 1937 through December 31, 1947 (the entire period covered by the exhibits). However, a C. F. Yoder is also listed in the exhibits as having acted as merchant agent at Listie in February, 1946. When the Express Agency was asked

3729 10. "Is Agent Entitled to Paid Vacation?"

The Express Agency states that only the exclusive commission agent is entitled to receive a paid vacation from the Express Agency. The joint agent is granted free vacation by his railroad employer, and the merchant and "other" agents do not receive any paid vacations.[145] It is

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about Mr. Yoder, it replied, at page 724 of the 1948 hearings:

> "This gentleman only worked 1 month. We find that he is a regular employee of Railway Express Agency. I believe he was a route agent and had to fill in there when the merchant agency couldn't be operated or wasn't operated any more by the regular merchant agent. He is an employee and should not be on this list."

Likewise, Agostino DeProspero is listed in the Express Agency's exhibit as the merchant agent at Bretz, West Virginia, from January 1, 1937, through December 1945. However, W. A. Hurd is also shown as merchant agent at Bretz in December 1944. When the Express Agency was asked about Mr. Hurd, it was stated at page 735 of the 1948 hearings, that "This gentleman was a regular employee of Railway Express Agency." It may be noted that in some instances individuals appearing in Exhibits XXXIABC as merchant agents, or as assistants to merchant agents, had also been engaged in performing other express services which were apparently not covered by the Express Agency's claim for refund. For example, J. B. Heady and G. D. Bagdasarian who assisted merchant agent Brennan, Plainville, Connecticut, and Henry Clifford Ladd, who assisted merchant agent Jackson, Wiscasset, Maine.

[145] In 31 M. C. 385 (Railway Express Agency, Incorporated, Extension of Operations—Bristol, R. I.), decided December 9, 1941, it is stated that the express agent at Warren, Rhode Island, was a "farmed-out-agent", and that "The agent, who has been in the exclusive service of applicant for over 20 years, receives vacation leave on the same basis as applicant's regular employees." (page 388). According to the Express Agency's Exhibits XXXIABC, Warren, Rhode Island, was a merchant agency from January 1, 1937, through February 1946.

apparent from this that, insofar as their relationship with the Express Agency is concerned, both the joint agents and the "other" commission agents (who are admitted express employees) are in exactly the same situation as the merchant agents who are considered by the Express Agency to be independent contractors. As was stated in the Examiner's First Report in Jurisdictional Docket No. 2, page 31:

> "A Company may have a different policy with respect to various classes of its employees; it may extend the benefits of its vacation or pension plans to one group of employees and withhold the benefits of such plans from another group; it may grant increases or impose decreases of pay with respect to one group of employees and maintain a mere uniform rate of pay with respect to others of its employees. However, such differences in treatment do not necessarily indicate that the individuals who are accorded different treatment in these respects are not subject to the same authority of the employer to supervise and direct the manner of rendition of their service as are the other employees. The difference in treatment may be due merely to the fact that one group is paid on a salary rather than a commission basis, that some are only part-time employees, and the like."

3730 11. "Is Agent Entitled to Free Transportation?"

The Express Agency states that it furnishes free transportation to the exclusive commission agents only. It is apparent therefore that although the railroads may furnish the joint agent free transportation, because of his railroad service, that there is no difference on this point between the joint, merchant and "other" agents, insofar as their relationship with the Express Agency is concerned.

12. "Are Any of Agent's Employees Required to Wear Express Agency Badge?"

The Express Agency has answered this question "yes" with respect to exclusive commission agents and "no" with respect to the joint, merchant and "other" agents. Rule 807 of the "General Rules and Instructions" provides that "Agents must furnish vehicle employees with the Company's regulation badge, keeping a record of such badges and requiring vehiclemen to surrender them when leaving the service." Rule 828 provides that: "Employes who receive and deliver goods elsewhere than at the Company's offices must wear the Company's regulation badge on the front of their caps while on duty. If badge is lost, stolen, or damaged, prompt report must be made to the official who furnished it." When these two rules are read together it appears that the "employes" referred to in Rule 828 are the "vehicle employes" referred to in Rule 807. The record does not indicate whether the terms "vehicle employes" or "vehiclemen", as used in Rule 807 would include individuals who perform express pickup and delivery work in their own vehicles, or in vehicles owned by the express agent. Aside from this, however, it is apparent that there is no difference on this point between the assistant to the joint agents, who are conceded to be employees, and the assistants to the merchant agents, who are considered by the Express Agency not to be its employees.

13. "When Relation With Express Agency Is Severed What Happens to Agent's Employes?"

The Express Agency states that when this happens only the exclusive commission agents' employees remain in the employ of the Express Agency. Aside from the fact that it is not specifically established in the record that
3731 "employees" of exclusive commission agents always remain in the employ of the Express Agency when the

agent's relation with the Express Agency is severed, it appears that in some instances, at least, assistants to merchant agents have either succeeded to the agency when the agent severed his relationship or have continued to work for his successor as agent.[146]

14. "Must the Agent Himself Remain on the Job or May He Delegate All Work and Supervision to Another Without Consulting Express Agency?"

The Express Agency states that the exclusive commission agent must remain on the job;[147] that the railroad requires

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[146] For example, F. J. Hruza was merchant agent at Laguna Beach, California, from July 7, 1942, to January 31, 1946, when he was succeeded by Cleoto H. Encell. According to Exhibit XXXIC, Cleoto H. Encell has the same social security number (and is presumably the same person) as Cleoto F. Hruza who assisted F. J. Hruza while he was agent at Laguna Beach. In addition, two of the other individuals (J. H. Encell and E. W. Jackson) who assisted agent Hruza were among those that assisted his successor, Agent Encell. Similarly, W. V. Bell who had previously assisted agent W. H. Bell at Casey, Illinois, succeeded him as agent there on January 1, 1944 (Exhibit XXXIC); R. C. Cole who had previously assisted agent L. D. Bailey at Eaton, Ohio, succeeded him as merchant agent at that point on February 11, 1942 (Exhibit XXXIA); Agent Simpson, Carrolton, Illinois, succeeded his father as agent when his father retired (48R. 505), and C. A. Schreiber who had pervionsly assisted agent C. D. Schreiber at Tell City, Indiana (Exhibit XXXIC), succeeded him as agent at that point effective July 1, 1951 (November-December, 1951 issue of "The Express Messenger").

[147] In this connection it should be noted that when the Examiner asked Superintendent of Organization Lace whether there was "any actual difference in the duties performed by the exclusive commission agent and the merchant agent", he replied (48R. 251):

> "*In either case, of course, it is required that all of the express work at the town be handled by the agent or someone delegated by the agent*, so that there is little, if any, difference in the work. Express work is similar all over." (Emphasis supplied.)

the joint agent to remain on the job, and that the merchant and "other" agents may delegate their work without consulting the Express Agency.[148] Aside from the
3732 fact that the record does not specifically establish that
all exclusive commission agents are required to remain on the job at all times,[149] it is clear that the joint railroad

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Although Mr. Lace subsequently amended his testimony to mention several alleged differences between the exclusive commission and merchant agents he did not change his testimony that "*in either case * * * it is required that all of the express work * * * be handled by the agent or someone delegated by the agent.*" (Emphasis supplied.)

[148] Rules 5 and 812 of the "General Rules and Instructions" provide for some delegation of authority by agents. Moreover, since the "General Rules and Instructions" refer to both exclusive and non-exclusive employees it is clear that the Express Agency realizes that all of its employees do not devote their full working time to express work.

[149] The Express Agency has admitted that exclusive commission agents coming within the Agency's Category 2(b) (page 7 of the Express Agency's main brief) may engage in some independent business of their own. Moreover, some of the individuals who the Express Agency decided at the 1948 hearings should be considered as exclusive commission agents have also been employed in some outside activity. For example, the Express Agency states with respect to agent Matthew Lewis, Hermosa Beach, California:

> "He was a regular employee for Wells Fargo Company, evidently; he began in 1918. This man was also a ticket agent for a travel bureau and for bus lines. We will call him an exclusive commission agent." (48R, 727);

and with respect to Agent William B. Chamberlin, Plainville, Connecticut:

> "This man possibly should be considered as an exclusive commission agent. His only outside employment was one hour picking up and delivering for the New York, New Haven and Hartford Railroad, and carrying U. S. mail between the railroad station and the

express agents have not all been required to remain on the job,[150] and the record clearly indicates that the joint
3733 agent, a conceded employee with respect to his express work, does not consult the Express Agency when he is going to be absent from his position as joint railroad-express agent.

> post office. All the rest of his work was express work, and I notice it did constitute quite a considerable amount." (48R 728).

The Express Agency's attorney also stated:

> "We will consider him as an exclusive commission agent. I might add that the issue is a close one there."

150. It appears that joint railroad-express agents often engage in business activities in addition to their railroad and express work. Thus, in Exhibit 2A, introduced by the Express Agency in the 1938 hearing, the Express Agency lists 387 "merchant agents" who were engaged in both railroad and express work and indicated their other business activities. With respect to individuals of this type, General Auditor Gross of the Express Agency stated "we consider them as joint railroad express agents, not withstanding they had other activities." (58R, 3). See also the testimony of Superintendent Huff in the 1938 hearings. For example, at page 27 of the 1938 hearings Superintendent Huff was asked the following question:

> "Is it true, Mr. Huff, that the joint railroad express agents are engaged and always have been engaged in many activities other than the railroad and express service? Answer what you know."

He replied:

> "As far as my experience goes, that is true of a great many small joint railroad and express agents. They are grain buyers, dealers in various other commodities raised in the particular regions in which they reside, or are interested in contracting business, or are directors of banks, and take part in local political situations, etc. * * *".

And at pages 34-36 the following questions were asked by Mr. Schreiber and replied to by Superintendent Huff, as follows:

> "Q. I think you testified that many of the joint rail-

3734 15. "Who Has Supervision Over the Manner of the Performance of the Express Work by Agent and his Employees?"

The Express Agency states that it has supervision at the exclusive commission agency; that the railroad and it have supervision at the joint agency, and that the agent has supervision at the merchant and "other" agencies. For the reasons stated in this report the Examiner is of the opinion that the evidence of record, the legislative history, and the applicable legal principles necessitate a different conclusion than that reached by the Express Agency with respect to its merchant agents.

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road and express agents are also engaged in some business other than that for the railroad and express agency. Is this applicable to those railroad and express agents who devote full time to the railroad and express agency? Do they conduct their special business outside the railroad working hours?

"A. I would presume that they do.

"Q. You mean that they put in an eight hour day on railroad and express work and at night they have some other work?

> "Mr. Hartung: I do not think Mr. Schreiber has a correct understanding of the situation. The railroad agent has not enough work to consume all of his time, and he acts as a joint agent for the Railway Express Agency. It has been a recognized practice for railroad agents to be engaged in other business. They may be handling that same business during the same hours that they are conducting their railroad work. Their railroad work may take only a few hours a day of their time. Maybe they have clerks that are doing that work. Many have been engaged in other businesses although during the same hours when they were performing their railroad duties.

"Q. I want to know whether in answer to the question presented the witness intended to convey that in most cases, the railroad and express agents are also in some business other than that for the rail-

16. "Who is Responsible for Damage or Injury Caused by Negligence of Agent's Employees?"

The Express Agency states that it is responsible at the exclusive commission and joint agencies; that the agent is probably responsible at the "other" agencies, and that the agent is responsible at the merchant agencies.[151] As

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> road and express agency, and in the cases where it is true, do they conduct business at the same time that they conduct the railroad and express business, or is it a business conducted during irregular hours?
> "A. I would say that it is done during the same hours that they perform the railroad service.
> "Q. Would you say that this applies to the majority of the railroad agents or to a small number?
> "A. I don't believe I could confine that entirely to the working hours of the agent because I do know that he does some of his business after hours or before he comes to work in the morning, but I should say that the large part of it is done at the time he is at the railroad station, because everybody knows where he is.
> "Q. With respect to these joint railroad and express agents, who are engaged in other business, does this other business interfere with respect to the duties of the express agency of the railroad?
> "A. I cannot answer for the railroad but it has never interfered with the service where the express agency is concerned."

And at page 38, in answer to a question from the Telegraphers Attorney, Mr. Hassenauer, as to whether he had any idea as to what percentage of the joint railroad and express agents had outside occupations, superintendent Huff replied "That would only be a guess, but the percentage would not be great. Probably fifteen or twenty per cent."

[151] However, even if a merchant agent should enter into an agreement with the Express Agency whereby the agent would agree to be responsible and liable for the acts of the individuals assisting him in performing the work, this would not in itself prevent the agent from being an employee of the Express Agency. For example, in *King*

a common carrier the Express Agency has assumed certain obligations or responsibilities which it cannot avoid.[152]

In speaking of these responsibilities the Court in
3735 *Railway Express Agency* v. *Kessler*, 52 S. E. 2d 102 (Virginia, 1949), said at page 103:

> "In the transportation of goods an express company is, of course, a common carrier and is an insurer of the goods in transports, subject to a few recognized exceptions for happenings beyond its control, as vis major and the like. Its duty goes a step beyond that

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v. *Southwestern Greyhound Lines*, 169 F. (2d) 497 (C. A. 10, 1948), cert. den. 335 U. S. 891 (1948) the contract between the Bus Companies and the station agent (King) contained a provision that "He was to be held responsible and liable for all acts of his employees, subordinates and associates." (p. 499.) The Court held, that the agent, King, was an employee of the companies within the meaning of the re-employment provisions of the Selective Service Act.

[152] Thus, the Express Agency stated in its Brief after Rehearing, dated September 15, 1938, p. 18:

> "* * * the Express Agency, a common carrier, owes a duty to the public to see that the work it contracts to do is carefully performed so as to avoid injuries to others, and it cannot by letting a part of such work to a sub contractor avoid liability in case such work is negligently done in the injury of a third party. The rule is well settled in the case of *Covington, etc., Bridge Co.* v. *Steinbrook & Patrick*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375:
>
> > 'The weight of reason and authority is to the effect that where the party is under a duty to the public or third person to see that the work he is about to do, or have done, is carefully performed, so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done to the injury of another.'
>
> To the same effect, see *Grinnell* v. *Carbide & Carbon Chemicals Corporation*, 276 N. W. 535 at 543 (Michigan, 1937); *Weight* v. *H. G. Cristman Co.*, 221 N. W. 314 (Michigan, 1928); *O'Neill* v. *Gray*, 30 Fed. 2nd 776, Certiorori denied, 279 U. S. 865."

> applicable to railroad companies and water carriers and requires it to make delivery in person to the consignee or his authorized agent at the address given. Express Companies are said, in fact, to owe their origin to the need or value of this extra service. They claim to render superior service and for it they usually make a higher charge. It is proper that they should be held to a strict performance of their duties safely to transport and deliver. *Hutchison* v. *United States Express Co.*, 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S. 393 and note; Hutchison on Carriers, 3d Ed., Vol. 2, p. 801, et seq.; 9 Am. Jur., Carriers, §546, p. 754; 13 C. J. S., Carriers, §171, page 329."

Similarly, the Court in *Akerly* v. *Railway Exp. Agency*, 77 A. 2d 856 (New Hampshire, 1951), said at page 858:

> "According to established principles, the plaintiffs are entitled to recover if their goods were delivered to the defendant in good condition, and by it to the consignee in damaged condition, unless the defendant has established that the damage was due to a cause or causes within the exceptions stated in its contract with the plaintiffs."

And in *Railway Express Agency* v. *Hueber*, 191 S. W. 2d 710 (Texas, 1945), the Court said at page 712:

> "It is clear from the above that a railway express agency, which takes goods for interstate shipments, is liable for any loss, damage or injury to such property, caused by it, with the one exception, that a shipper can not recover a greater value than that placed on the goods at the time they were turned over to the agency for transportation."

17. "Does Agent Carry Workmen's Compensation Insurance Covering Employees Engaged in Express Work?"

The Express Agency states that the exclusive commission and joint agents do not carry workmen's compensation insurance, and that the "other commission agents" gen-

erally do not carry it, but that the merchant agents generally do carry workmen's compensation insurance. Aside from the fact that it has not been definitely established that none of the exclusive commission or joint agents carry workmen's compensation, or that all merchant agents do, it should be noted that some state laws limit coverage under their workmen's compensation laws to individ-
3736 uals having a specified statutory number of employees.[153]

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153. See Digest of Workmen's Compensation Laws of the United States and Territories, 16th Edition, Association of Casualty and Surety Companies, (Comparative Analyses, p. 12):

"Employments with less than the number of persons employed, or 'regularly' or 'usually' employed, stated below in parenthesis, are exempted from the application of the law, or of some crucial provision of the law or from penalties for non-acceptance where the law is elective, in Alabama (8), Alaska (3), Arizona (3) ('workmen or operatives'), Arkansas (5, with exceptions), Colorado (4), Connecticut (5), Delaware (3), Florida (3), Georgia (10), Kansas (5, with exceptions), Kentucky (3), Maine (6), Massachusetts (3), Michigan (8), Missouri (11, with exceptions), New Hampshire (4, with exceptions), New Mexico (4, with exceptions), North Carolina (5, or in some employments, 10), Ohio (3, 'workmen or operatives'), Oklahoma (2 'workmen'), Puerto Rico (3), Rhode Island (4), South Carolina (15), Tennessee (5), Texas (3), Utah (3 'workmen or operatives'), Vermont (8), Virginia (7), West Virginia (4), and Wisconsin (3 whether in one or more trades, businesses, professions and locations). And the New York law does not apply to private employments not specifically listed as 'hazardous' unless 4 or more 'workmen or operatives' are regularly employed. Note that some of the laws above cited specify that in computing the numerical exemption only employees engaged in 'the same business' or employed 'within the state' shall be counted, or otherwise specify what kinds of employees shall be counted for such purpose; but generally the statutes are indefinite on such points and open to diverse constructions.

18. "Does the Agent Spend or is he Required to Spend his Full Working Day on Express Work?"

The Express Agency states that the exclusive commission agent is required to spend his full working day on express, and the joint agent is required to spend his full working day on railroad and express, but that the others are not required to spend their full working day on express. The statement with regard to the exclusive commission and joint agents is not correct. As previously pointed out, the record shows that some of the so-called exclusive commission agents do spend some time in outside activities, and that some joint agents engage in outside activities. Aside from this, the General Rules and Instructions (Rules 836-839 and 1014) indicate that it is not expected that all express agents will devote their entire working time to express service.

3737 19. "Is the Agent Dependent Upon the Railroad Industry for his Livelihood?"

The Express Agency states that the exclusive commission agents and the joint agents are dependent on the railroad industry for their livelihood, that the "other" agents are generally not dependent on the railroad industry, and that the merchant agents are not dependent on the railroad industry. As previously pointed out above some exclusive commission agents, and some joint agents, are not wholly dependent on the railroad industry for their livelihood. Moreover, the evidence of record indicates that in some instances the individuals described as merchant agents

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"There are no 'numerical exemptions' in the laws of California, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Minnesota, Montana, Nebraska, Nevada, New Jersey, North Dakota, Oregon, Pennsylvania, South Dakota, Washington and Wyoming, or in the District of Columbia and Longshoremen's Acts."

actually receive greater compensation from the railroad industry (express service) than some of the exclusive commission agents who are admitted employees.[154]

It is apparent from the foregoing discussion that the 19 alleged "principal differences" set forth at pages 10 to 12 of the Express Agency's main brief do not form a basis on which any clear distinction can be drawn between the various commission agents. On the contrary, an analysis of these alleged differences merely points up the similarities between them and indicates that they are all employees. Aside from this, however, it is clear that the so called merchant agents are, in fact, "employees of the Express Agency within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts.

3738 As previously pointed out, an individual is an "employee" if he is subject to the continuing authority of the "employer" to supervise and direct the manner of rendition of his service, which service he renders for com-

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[154] The Express Agency admits that the exclusive commission agents in the Express Agency's Categories 2(b) and 2(c) earn express commissions of less than $125 a month. Examination of the Express Agency's Exhibits XXXIABC discloses that some of the merchant agents have averaged more than $125 a month for their express work, during a year according to their reported net express commissions. For example, see the following:

Location	Agents	Net Commissions 1946	 1947
Danielson, Conn.	R. N. Pellett	3201.61	3181.56
Jewett City, Conn.	U. S. Jodoin	3062.40	3295.52
Westboro, Mass.	F. S. Carter	2469.61	1665.05
West Warren, Mass.	S. T. Surowiec	2916.13	3261.28
Lisbon, N. H.	G. C. Morgan	3420.32	3303.61
Casa Grande, Ariz.	C. A. Guinn	*1640.90	2807.79
Lynwood, Calif.	H. B. Virtue	2432.83	2430.08
Winchester, Ind.	E. W. Meyer	3320.18	3526.17
Hudson, Mich.	K. M. Day	3517.69	3562.34
Warrenton, Virginia	H. T. Dowell	2915.29	3403.71

(*Net commissions for 8 months; Mr. Guinn did not become agent at Casa Grande until May 1, 1946, according to Exhibit XXXIC.)

pensation, and this is so irrespective of whether the right to supervise and direct is ever actually exercised. For the reasons hereinafter discussed it is clear that the Express Agency has the right to supervise and direct the manner in which the merchant agents perform their express work, and that they are, therefore, employees of the Express Agency within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts.

In the first place, the work performed by the merchant agent is a continuing service which forms an integral part of the day-to-day operations of the Express Agency, and is, therefore, the performance of a service coordinated with the rest of the railway express business, and a necessary link in the transportation service which the express Agency, as a common carrier, offers to the general public.[155] In

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[155] Such continuity of service, as contrasted with a contract for a specific job, is indicative of employee service. See *Louisville, Evansville and St. Louis Railroad Company* v. *Wilson*, 138 U. S. 501, 505 (1891), and *Tapager* v. *Birmingham*, 75 F. Supp. 375 (N. D., Iowa, 1948). In the latter case the Court said, at page 386:

> "The factor 'permanency of relation' is a component to be considered in the entire situation as tending to establish as a matter of economic reality the dependence of the one performing the services upon the business of the one for whom the services are performed, while inpermanency of relation tends to establish his independence. The relationship of an independent contractor generally contemplates the obtaining of an agreed and and usually contemplates the obtaining of that end within a stipulated period of time. The relationship of employment generally contemplates a continuous and indefinite rendering of services which relationship is terminable either at the option of the employer or the employee without contractual liability. The continuing dependency of the one rendering services to the one for whom the services are rendered is of importance in connection with the factor of 'permanency of relation.' Thus, an element of definiteness as to the time of the termination of the

3739 carrying on its business the Express Agency must comply with the regulations of the Interstate Commerce Commission and various state regulatory bodies, must meet certain obligations to its patrons, the general public, and must maintain close harmony and cooperation with the rest of the railroad industry. It is evident therefore that, for its own protection, the Express Agency must reserve the right to control the details of the work and thus make certain that the work is done in such a manner as will insure compliance with the regulations of the Interstate Commerce Commission and various state regulatory bodies, and fulfillment of its common carrier obligations to its patrons, as well as making for harmony and cooperation with the railroads. In view of this complex situation, it is not surprising that the Express Agency and its predecessors have for many years issued detailed rules and regulations governing the handling of express, and the operations at express agencies, which rules and regulations go beyond results and relate to methods and detail. ("General Rules and Instructions", Exhibit 8 in the 1937 proceeding, and Exhibit XXXVII in the 1948 proceedings.)

The Express Agency contends, however, that not all the rules and instructions contained in its "General Rules and Instructions" are applicable to merchant agents,[156] and that

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relationship gives rise to an inference of impermanency and independence, while indefiniteness as to the time of termination gives rise to an inference of permanency. The fact that the services are rendered by part time work does not rebut the inference of permanency so long as the services rendered are reasonably and regularly recurrent."

[156] It is of course, evident that some of the rules and instructions specifically refer to employees other than agents. For example, Rules 865-871 specifically refer to train employees; Rules 172-174 specifically refer to messengers. Rules 79 and 1132 refer specifically to vehiclemen, and Rules 818 and 884 refer to the duties of employees as

only those rules which are in the nature of "specification as to results" apply to them.[157]

3740 In the oral agrument presented to Examiner Schoene on January 17, 1938, Mr. Hartung, attorney for the Express Agency, stated that the rules and instructions "were written so that they could be used, applied and followed to the extent which was necessary in the case of the individual connections which were made, the extent of the application of the rules depending on the nature of the re-

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distinguished from the duties of the agents to whom such employees report. Likewise, some of the Rules apply only to "agents", such as Rules 229, 612 and 813; some apply only to "agents and messengers", such as Rules 227 and 706; some refer to "agents and employees", such as Rules 835 and 846.

[157] In the 1937 and 1938 proceedings the Express Agency also contended that the rules and instructions were not all applicable to joint railroad-express agents. Superintendent Huff, testifying in the 1938 hearing, stated at pp. 31-32, that:

> "The general rules and instructions are issued by the Railway Express Agency, and the same thing was true with respect to general rules and instructions issued by predecessor companies, and I believe a copy has been introduced in this case. They are very general and comprehensive in their scope. *They are issued for guidance for all individuals who conduct or handle express business, whether as salaried employees, commission employees, joint employees, or employees of persons handling the business under contractual arrangements.* It has never been the practice of any express company to issue separate sets of general rules and instructions to these different classes of persons. For this reason, there are many rules contained in the general rules and instructions which have no application whatever to joint railroad and express agents or merchant agents. The principal application of the general rules and instructions to joint and merchant agents is to meet requirements of the law and to permit safe transportation of express matter." (Emphasis supplied)

lationship." (37 O.A., 13). However, at the 1937 hearing, in reply to a question as to whether the "General Rules and Instruction" applied to joint agents, Mr. Hartung stated, at page 30:

> "You will find when reading these regulations that in some instances they apply to employees and in other instances to agents. *The rules explain themselves.*" (Emphasis supplied)[158]

Turning to the "General Rules and Instructions" we find the following:

> "General Rules and Instructions include those Express Regulations which with *authorized exceptions* remain in force always, everywhere, and among all employees concerned. (Emphasis supplied). (Page 1)
>
> "836. Employes *exclusively* in the service of this Company will not be permitted to give their time during business hours to outside matters. (Emphasis supplied).

3741 "838. Employes *exclusively* in the service of this Company are prohibited from dealing commercially in any commodity carried by express, nor must they act as Agents or Sales Representatives of any Company or an individual dealing in commodities carried by express. (Emphasis supplied)

> "839(a) Employes *not exclusively* in the service of the Company, while not prohibited from dealing in

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[158] Similarly, when Vice President Morgan of the Clerks asked the Express Agency's witness, Mr. Hall, regarding the intent of the "General Rules and Instructions", the Express Agency's attorney, Mr. Long objected to the question "upon the gound it speaks for itself." (48R, 433) Again, at the oral argument on October 6, 1954, when the Examiner asked Mr. Long, whether Rule 920, relating to the use of telephones, would apply to any agency where the Express Agency did not itself furnish the telephone, Mr. Long replied (48 O. A., 11):

> "It doesn't apply to merchant agents. *The rule speaks for itself; I can't add to it.*" (Emphasis supplied)

commodities carried by express, will not be accorded any facilities which will give them an advantage over others.

"(b) *Non-exclusive* employees are prohibited from acting as Agents or Sales Representatives of any Company or individual dealing in commodities carried by express * * *". (Emphasis supplied)

"840. *Employees* are positively forbidden to solicit or influence consignments to be made to any particular person * * *". (Emphasis supplied)

"1042. Every *salaried* agent or *other official* should maintain on card Form 1119 or book Form 5042, as required, a record of all personal property and equipment on hand received, transferred, retired or otherwise disposed of. *Route Agents* will maintain record of personal property at *commission* agencies." (Emphasis supplied)

It is evident from the foregoing that where there is intended to be an "authorized exception" the rules themselves generally contain a limitation or restriction on
3742 their applicability.[159] Consequently, where there is no limitation or restriction, and the rule or instruction re-

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[159] Thus, in some instances the rules applicable to agents are clearly not applicable to all agents, or the rule itself specifies the difference in application as between certain agents. For example, Rule 169 points up the difference in handling remittances at points from which more than one remittances is forwarded at the same time to the same depositary, and the way in which it is handled at all other offices; Rule 307 is applicable only to agents at Interior Ports of Entry; Rule 632 is applicable only to agents at offices not provided with proper facilities for keeping and guarding money and valuables, and Rule 760 is applicable only to agents at destination and transfer points. Rule 797 would not be applicable unless an agent had employees or messengers under his jurisdiction, and in small towns where the agent knows the addresses and phone numbers of his assistants such knowledge might be considered as amounting to substantial compliance with the Rule, even if no written record was kept. Rules 804, 805 and 807

unless, of course, the Rule refers to some service not performed at a particular agency,[161] or the equipment or facillates to the duties performed by merchant agents, it follows that the rule or instructions applies to such agents,[160] ity referred tc in the rule has not been furnished at that ageeny.[162]

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would apply only to points where vehicle service is maintained. Rule 808 would apply only to agents at terminal points. Rule 809 would apply only to agencies where messengers receive mail or lay over. Rule 811 would apply only to agents who have contact with train employees. Rule 815 would apply only to those in joint railroad-express service. Rule 891 would not be applicable to agent at points not served by railroads. Rule 912 and Rules 916-919 would not apply to agencies where cipher codes were not furnished. Rule 920 would apparently apply only to agencies where the telephone "is furnished for the Company's business". (It could hardly be said that the telephone in the railroad station, or in an agency where the agent furnished the phone and used it in connection with his other business activities was "furnished" for the Express Agency's business.) Rule 921 would only apply to agencies where telephone operators are employed.

160. Of course, the mere fact that a particular rule has not been enforced at an agency does not mean that the rule is not applicable, or that the Express Agency would not have the right to enforce that rule if it should decide to do so. As previously pointed out, the statutes and regulations here involved provide that an individual is an employee of an employer if the employer has the right to supervise and direct the manner of rendition of the individual's work, irrespective of whether the right is ever actually exercised.

161. For example, the provision in Rule 84 that money orders must not be issued in favor of a known lottery would not be applicable to agents who do not handle financial paper, such as Horton and Westfall. Likewise, Rules 618-620 would not be applicable to agencies which do not handle financial paper.

162. For example, if the Agent doesn't carry firearms Rules 643 and 644 would not be applicable. Similarly, the Rules relating to "Care in and Around Offices" (Rules 615-

In the course of the 1948 proceedings the Express Agency referred specifically to a number of rules and instructions which it contended were not applicable to merchant agents.[163] These include, for example:

(a) Rule 820 which provides that:

> "No employee is permitted to delegate to another person any portion of his duties, unless authorized to do so by his superior officer."

In the 1937 and 1938 proceedings the Examiner found, and the Board held, that Rule 820 was applicable to joint and merchant agents. The Express Agency, on the other hand, contended that the Rule was not applicable to joint and merchant agents.[164] In its main brief in the 1948
3743 proceedings the Express Agency attaches great significance to the applicability or non-applicability of this rule to merchant agents, stating at page 15, "Whether that rule is applicable to merchant agents is crucial", and at page 22, "Whether Rule 820 applies to merchant agents is of extreme importance." The Express Agency states (page 15, of its brief) that Rule 820 "applies only to employes as distinguished from independent contractors and employes

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625) contain some provisions which would not be applicable to all offices. For example, Rule 615 would apparently apply only to express offices owned or controlled by the Express Agency. It would hardly apply to a joint office where the same space is used for both railroad and express work, or to an office located in the agent's place of business. Rule 616 would apply only to offices where a separate compartment is furnished an employee for transaction of the Company's business, and Rule 624 would apparently apply only to those who had been "entrusted with keys."

[163] In view of the preceding discussion relative to the applicability of the "General Rules and Instructions" to merchant agents, a discussion of each of these rules does not appear necessary.

[164] For example, see Brief of Railway Express Agency, Inc. After Rehearing, Page 16.

of in dependent contractors." In this connection, however, it is interesting to note the following statements made at the Oral Argument on October 6, 1954 (48 O. A., 15).

> "Examiner Funk: Mr. Long you referred to Rule 820?
>
> "Mr. Long: That's right.
>
> "Examiner Funk: Is it your contention that Rule 820 applies to salaried agents?
>
> "Mr. Long: Yes, that is right.
>
> "Examiner Funk: Is it your contention that it applies to exclusive commission agents?
>
> "Mr. Long: No, I don't think it applies to all cases of exclusive commission agents—it might."[165]

It would appear from this that when the Express Agency states that Rule 820 applies only to "employes" it includes within the term "employee" the salaried agents and at least some of the exclusive commission agents, but that there is some question whether it applies to all of the exclusive commission agents.[166]

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[165] See footnote No. 147.

[166] It would appear that the Express Agency also considers that Rule 820 does not apply to joint agents, who have been conceded to be employees of the Express Agency. In support of their contention that the Rule did not apply to either joint or merchant agents the Express Agency pointed out in its Brief After Rehearing (38 proceedings), page 16 that neither of the two joint agents who testified in the 1938 hearings had consulted any person connected with the Express Agency relative to who would conduct the express business at their agencies while they were absent for the purpose of testifying in the 1938 proceedings. Similarly, in its main brief in the 1948 proceedings, page 30, the Express Agency points to the fact that merchant agent Burns did not notify the Express Agency that he was going to attend the 1948 hearing, and did not inquire whether it would be proper to turn his express work over to his son and daughter while he attended the hearing, as evidence that he had failed to follow Rule 820 which the Express Agency claims is "the one rule which applies strictly to employes".

3744 As previously stated, the Express Agency's "General Rules and Instructions" are divided into five parts. Rule 820 is in Part 3, "Organization", under the subheading "Duties and Conduct of Employes, General Obligations of Service."[167] It is clear that at least some of the rules coming under this subheading do not apply to agents, and are, at least in part, limited in their application to employees other than agents. For example, Rule 818 apparently refers to the "employes" mentioned in Rule 797 under "Agents Duties of Supervision", Rule 822 refers to consultation by "employes" with the "agent, or other supervisor when necessary", and Rule 825 refers to a requirement that "All employes, other than cashiers, must settle in full to agent, cashier or other designated employe at the close of each day's business." Moreover, the "General Rules and Instructions" specifically provide for some delegation of work by express agents. Thus, Rule 5 provides that:

> "*Agents may delegate* limited authority to other employes, including authority to issue receipts; but must exercise such supervision as will enable them to determine that the work in every department is being properly performed." (Emphasis supplied)

And Rule 812, provides, in pertinent part, that:

> "Agents, or thoroughly competent assistants *delegated* by them, must, at least once each month, check the books, accounts and records of every employe handling money, C.O.D.'s of financial paper * * *". (Emphasis supplied)

In addition to the foregoing, other rules and instructions, while not specifically providing for the delegation of duties

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[167] The subheadings which precede this particular subheading in Part 3 are "Jurisdiction of Officials", "Regulations", "Agent's Duties of Supervision" and "Agent's Precautions Against Imposture".

by the agent, make it evident that such delegation does, at times, occur. For example, Rule 1 provides in part that "The responsible official in charge of every express office is the agent, or in his absence the duly authorized acting agent." This indicates that whenever the agent is absent from the office the individual left in charge of the office automatically becomes the acting agent, and that the agent, by the act of leaving the office, has thereby delegated certain duties to the individual who becomes acting agent during his absence. Moreover, since Rule 819 specifically provides that "Employes *exclusively employed* in the Company's service must not absent themselves from duty
3745 without permission" (Emphasis supplied), it would
seem to follow that employees not exclusively employed in the Company's service may absent themselves from duty without first securing permission. This would indicate that Rule 820 may not be fully applicable to non-exclusive employees.

As previously pointed out, some of the rules and instructions refer to employees other than agents and some refer to the duties of "employees" as distinguished from the duties of the "agents" to whom such "employees" report. When Rule 820 is read in connection with the other 1154 rules and instructions, with due regard to the subheading under which it appears, I am inclined to the view that this Rule was not intended to apply to agents who have been authorized by some of the rules and instructions to delegate duties to others, but rather that it, like Rule 818, for example, was intended to apply to employees other than agents. Assuming, however, for the purpose of argument, that Rule 820 does apply generally to agents as well as to other employees, than it could be said that Rules such as Rule 5 and Rule 812 constitute "authorized exceptions", to Rule 820. In any event, however, it is clear that merchant agents, like the other express agents, are authorized to delegate at least some of their duties to others, and that the applicability or non-applicability of Rule 820 to merchant agents is not crucial to the determination in this case.

(b) Rule 920 which provides that:

> "The telephone is *furnished* for the Company's business; employes should not be permitted to use it for personal matters except in case of emergency." (Emphasis supplied)

It seems obvious that this rule relates only to agencies at which the telephone is actually "furnished for the Company's business" by the Company itself. Certainly it cannot be said that the telephone at the joint agency, being used for both railroad and express business and very likely for Western Union, and perhaps for other business,
is "furnished for the Company's business",[168] yet
3746 the Express Agency has conceded, and rightly so,
that joint agents are its employees. Similarly, this rule would naturally not apply to agencies where the agent furnished his own telephone and used it for all of his business activities, including express. Thus, if, for example, an agent operated a railroad and express agency in his own elevator, it is obvious that Rule 920 would not be expected to apply so as to prevent him from using the elevator phone for elevator business.[169]

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[168] Article IV, Section 1, of the Express Operations Agreement effective March 1, 1929 (Exhibit No. 1 (1937 hearing)) provides, among other things, that where an employee of the railroad also acts as express agent the railroad will allow the Express Agency the use of the telephone at the station without charge, provided, however, that the Express Agency will pay any additional toll charge made by the Telephone Company.

[169] With reference to the furnishing of telephones at express offices it is interesting to note that some state laws ~~specify that express companies~~ doing business in the state should furnish "reasonably adequate telephone connec-

The Express Agency also issues bulletins and circulars, some of which are addressed to "all agents", and some to "all commission agents". Like the "General Rules and Instructions" these bulletins and circulars sometimes relate in part, at least, to the methods and detail of performing express work and the manner in which such work is performed.[170]

In support of its contention that merchant agents are
independent contractors, rather than employees, the
3747 Express Agency cites the case of *Harrison* v. *Greyvan*,

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tions between its offices, buildings and grounds, and the public telephone exchanges operated in the towns where the same are located." (General Statutes of Kansas, 1949, §66-193, and Revised Statutes of Nebraska—1943, Vol. 4 (Reissue of 1950), §74-529.) See also the Revised Codes of Montana, 1947, Vol. 4, §72-624. This section of the Montana code also provides that "each * * * express company shall cause to be promptly answered all calls made over such telephone connection during business hours", and that "over such telephone connection, such * * * express company shall cause prompt and correct replies to be made to all reasonable and proper inquiries over such connection during business hours * * *".

[170] A number of these bulletins or circulars were introduced in evidence in the 1938 proceedings. For example, Exhibit 1-B, Part 1, referred to the necessity of preserving original marks on returned shipments; Exhibit 1-B, Part 2, dealt with the care and protection of money and valuables; Exhibit 1-B, Part 7, was concerned with the improper use of labels on the shipment of luggage; Exhibit 1-B, Part 8, emphasized the requirements for filling out and submitting certain forms in duplicate and triplicate; Exhibit 1-B, Part 12, listed a number of traffic tips intended to assist the agent in securing more business, and one of the circulars in Exhibit 2-B, addressed to all agents in the South Pacific Department, set forth in detail the regulations pertaining to crating and inspection of live poultry shipments destined to the Hawaiian Islands, with the following admonition at the bottom of the circular:

> "When accepting shipments of live poultry be sure that these requirements are fulfilled, otherwise they will be held up at port of embarkation."

331 U. S. 704 (1947),[171] and states that the decision in this case should be governed by the Court's decision in the Greyvan case.[172] It points out that the truckmen in the Greyvan case were each given a manual which "purported to regulate in detail the conduct of the truckmen in the performance of their duties", and it quotes a number of the rules contained in the manual, pages 59-60 of its main brief. It contends, therefore, at page 60, that "The manual containing the general rules and instructions in the case of Harrison *vs.* Greyvan Lines, Inc. was given the effect which had been spelled out by the practice followed by Greyvan and the drivers concerned", and that "Treated in like fashion, the General Rules and Instructions apply to merchant agents, as spelled out by the practice followed, only as to results required."

With respect to the manual mentioned in the Greyvan case, the Court of Appeals for the Seventh Circuit said in

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[171] The Greyvan Company was a common carrier by motor truck, operating throughout thirty-eight states and parts of Canada, carrying largely household furniture. Its principal office was in Chicago, but it maintained agencies to solicit business in many of the larger cities of the areas it served. In this connection, it may be noted that the Greyvan case involved only the status of the truckmen; it did not involve the status of the individuals in charge of the aforementioned agencies.

[172] The Greyvan case was a suit against the Collector of Internal Revenue to recover taxes assessed and collected from the Greyvan Company under the Social Security Act on the compensation of certain truckmen. The lower courts had held, and the Supreme Court agreed, that the truckmen were independent contractors within the meaning of the Social Security Act. The case was decided by the Supreme Court together with United States *vs.* Silk, on June 16, 1947. The majority decision was written by Mr. Justice Reed, in which decision Chief Justice Vinson and Mr. Justice Frankfurter, Mr. Justice Jackson and Mr. Justice Burton concurred. Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Murphy and Mr. Justice Rutledge dissented.

Greyvan Lines v. *Harrison*, 156 F. (2d) 412 (1946), at page 415 (requoted in the footnote on page 717 of the Supreme Court decision):

> "While it is true that many provisions of the manual, if strictly enforced, would go far to establish an employer-employee relationship between the Company and its truckmen, we agree with appellee that there was evidence to justify the court's disregarding of it. It was not prepared until April, 1940, although
> 3748 the tax period involved was from November, 1937, through March 1942, and there was no evidence to show any change or tightening of controls after its adoption and distribution; one driver testified that he was never instructed to follow the rules therein provided; an officer of the Company testified that it had been prepared by a group of three men no longer in their employ, and that it had been impractical and was not adhered to."

And the Supreme Court said at page 710:

> "It suffices to say that the manual purported to regulate in detail the conduct of the truckmen in the performance of their duties * * * A company official testified that the manual was impractical and that no attempt was made to enforce it."

The Express Agency's "General Rules and Instructions", unlike the manual in the *Greyvan* case, was used by the Company, and a similar instruction book was used by its predecessors, long before the period for which refund has been claimed commenced and, in fact, long before the enactment of either the Railroad Retirement or Railroad Unemployment Insurance Acts. Moreover, there is nothing in the record of the 1937, 1938, or 1948 proceedings to indicate that the Express Agency's "General Rules and Instructions" are considered to be impractical. The very fact that the Express Agency has introduced three editions, the 1924, 1936, and 1948 editions, in evidence indicates that the rules and instructions have been considered to be practical, otherwise the Express Agency would have had no reason to continue revising and reissuing the manual. Although one official of the Express Agency testified that he never gave copies of the "General Rules and Instructions" to merchant agents in his territory, the evidence of record otherwise tends to support the Express Agency's statement, at pages 12 and 13 of its main brief, that it always furnishes a copy of the book of instructions to its merchant agents. Moreover, as pointed out above, the rules and instructions contain information which the merchant agents need in order to perform the express work. Thus, when Superintendent Huff was asked:

> "Is it essential to know the provisions of the rules and regulations insofar as they relate to express business and in order to carry out the tariffs?"

He replied

> "That is correct." (38 R, 19.)

3719. It is clear from the foregoing that the factors which fully justified the Court's action in disregarding the manual referred to in the *Grevran* case are not present in the instant case.[173]

There are also a number of other factors which distinguish the truckmen in the *Grevran* case from the commission agents in this case. The Express Agency is a common carrier, organized by the railroads as their own joint express agency, or facility, for the conduct of the express business, and, as such, is engaged in the transportation

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[173] In addition to the "General Rules and Instructions" merchant agents are also required to comply with the General Accounting Instructions for Commission Offices, Circular No. 93-A (Exhibits XXXIX A, B, C), and, when handling explosives, with the Interstate Commerce Commission Regulations for the "Transportation of Explosives and other Dangerous Articles by Express" (Exhibits XVIII A, B, C, D). They also receive, from time to time, various circulars and bulletins relating to the performance of their express work (see Exhibits 1-B and 2-B introduced by the Telegraphers in the 1938 proceedings).

of property and express throughout the United States, Canada, Cuba, Alaska and Hawaii. In 1948 the Express Agency had approximately 22,000 agencies located throughout the aforementioned territory. The Greyvan Company, on the other hand, is a common carrier by motor truck and operates a trucking business under a permit issued by the Interstate Commerce Commission under the "grandfather clause" of the Motor Carrier Act.[174] It operates throughout thirty-eight states and parts of Canada, carrying
largely household furniture.[175] As of November 1,
3750 1939, the Greyvan Company, in addition to some dis-
patchers, maintained 20 branch offices, each consist-

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[174] In *Greyvan Lines* v. *Harrison*, 156 F. 2d 412 (C. A. 7, 1946) the Court of Appeals, in referring to the district court's decision in that case, said at page 413:

> "The court found that as early as 1930, the Company developed a system whereby the transportation of goods entrusted to it for such transportation was contracted to suitable, responsible owners of motor vehicle equipment residing in the various states in which it did business."

[175] In *Greyvan Lines, Inc., Common Carrier Application*, 32 M. C. C. 719 (1942), it was stated that Greyvan was found entitled to continue operations as a common carrier by motor vehicle of the following items: (1) household goods, (2) cash registers and parts therefor and adding and computing machines, and (3) bakery equipment, dishwashers, scales and parts therefor, and food-mixing and cutting machines. This points up the limited scope of Greyvan's operations as contrasted with those of the Express Agency, which are described in the "General Rules and Instructions" under "General Remarks" as follows:

> "The business of the Company is to forward by rapid conveyance, shipments of Merchandise, Perishable Freight, Live Stock, Live Animals, Jewelry, Bullion, Coin, Currency, Bonds, Valuable Papers, etc., and to deliver same promptly, to make collections with or without goods; to fill orders; to attend to commissions; and to sell and pay money orders, traveler's cheques, etc."

ing of a manager and an office girl. These branch managers were paid a salary plus a commission on the business the manager was able to obtain for the Company. The manager and the office girl were both admitted employees of Greyvan, and their status was not involved in the *Greyvan* litigation.[176] From 1929 to 1932, Greyvan, and its predecessor the "Transit Vans Company", used both its own vehicles and those owned and operated by others in conducting its operations. Between 1932 and the spring of 1938, it owned no equipment of its own and relied entirely upon the use of vehicles owned by others. Since 1938 both company-owned vehicles and those belonging to owner-operators have been used. The use of the owner-operators' equipment has been obtained by means of written contracts between them and the Company whereby the owner-operators have, in effect, leased their equipment to Greyvan, and agreed to operate the same under the direction of Greyvan's own employees (*Greyvan Lines v. Harrison*, 156 F. (2d) 412, 415 (C. A. 7, 1946). Under these agreements, Greyvan agreed to maintain offices in various cities in the United States; to contract with shippers for transportation, and to maintain sales representatives, at such points as it deemed advisable, and the truckmen agreed to haul, with their own equipment, the shipments which Greyvan contracts to carry for the various shippers.

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[176] In addition to these branch offices Greyvan obtained business through a so-called "agency" method, which consisted of any person, whether it be another carrier, broker, or storage company, who signs business for hauling by Greyvan or merely refers leads to Greyvan for booking and hauling. These so-called "agents" are actually brokers instead of agents and are concerned only with collection of a 20 per cent commission for the service of acting as intermediaries between the shipping public and Greyvan. No particular form of agreement has ever been in effect with such "agents" and they are not a part of Greyvan's own operating organization. Such persons conduct their own warehouse or motor-carrier businesses, and the only apparent limitation imposed by Greyvan is that they not represent motor carriers in competition with Greyvan (*Greyvan Lines, Inc., Common Carrier Application*, 32 M. C. C. 719 (1942)).

As remuneration, the truckmen receive a percentage
3751 of the tariffs charged by Greyvan under the hauling
contracts. This percentage ranges between 50 and 52 per cent, with a bonus of up to 3 per cent for satisfactory performance.[177] In sharp contrast to the truckmen in the *Greyvan* case the commission agents here involved perform their express work in connection with, or in addition to, their other business activities, and actually have little if any monetary investment in the express business,[178] and

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[177] It appears that the percentage paid to the owner-drivers under the terms of their contract with Greyvan have varied somewhat. The contract of June 1, 1935, provided that Greyvan would pay the owner-driver 70% of the base load price, provided no subsequent claims arose, for each shipment handled. This percentage payment was changed somewhat in the contracts of February 1, and June 1, 1937. (*Greyvan Lines, Inc., Common Carrier Application*, 32 M. C. C. 719, 720-721 (1942).)

[178] Although the merchant agents may have a considerable financial investment in their regular business activities (for example, the net worth of Horton's Standard Service was $52,000; the net worth of Burns' Wholesale Grocery Company was $100,000, and the net worth of Schreiber's drug business was $50,000), they have little if any investment in the express business. For example, *Agent Horton* testified that he had nothing invested in the express business. Although one of the Horton Standard Service Trucks is used in performing pickup and delivery work, it is evident that since it normally takes only about 30 minutes a day to handle express at Horton's agency, little if any of his investment in the truck could properly be called an investment in the express business. *Agent Burns* has $1300 invested in the truck that is used to handle, but his truck was not used exclusively for handling express. The record does not show that *Agent Schreiber* had any actual cash investment in the express business.

the percentage of the express tariffs which they receive for their work as express agent is far less than the owner-drivers, the "small businessmen", involved in the *Greyvan* case receive.

It is clear therefore that unlike the owner-drivers in the *Greyvan* case, the merchant agents, as such, assume no
entrepreneurial risk with respect to their work as
3752 agents for the Express Agency.[179] A good example
of this is Agent Schreiber who operated an express agency in his drugstore at Tell City, Indiana, in return for a 10% commission on the express business handled at the office. Although Agent Schreiber apparently had no actual cash investment in the express business, and had assumed no entrepreneurial risk in connection with the express work, the record, and Exhibit XXXI ABC, both show that he received a substantial net remuneration from the express business handled at his office.[180] Moreover, the commission agents are official representatives of the Express Agency in their respective communities and deal with the general public as such, while the truckers in the *Greyvan*

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[179] In this respect the merchant agents also differ from the factors (petroleum products distributors) involved in *Texas Co.* v. *Higgins*, 118 F. (2d) 636 (C. A. 2, 1941); *Glenn* v. *Standard Oil Co.*, 148 F. (2d) 51 (C. A. 6, 1945); and *Indian Refining Co.* v. *Dallman*, 119 F. (2d) 417 (C. A. 7, 1941). In the *Texas Co.* case the distributor referred to therein had $33,000 invested in petroleum distribution business at one point and $30,000 invested at another point; in the *Glenn* case the distributors had invested a minimum of $2000 up to a maximum of $60,000 in the petroleum distribution business, and in the *Indian Refining* case the distributor had invested $6000 at one point and $6500 at another point. (See also the District Court's decision in *Indian Refining Co.* v. *Dallman*, 31 F. Supp. 455 (S. D. Ill., 1940).)

[180] For example, the net commissions reported for agent Schreiber amounted to $2,200.92 in 1946 and $2,871.65 in 1947 (Exhibit XXXXIB).

case have no dealings with the general public.[181] Furthermore, the truckmen in the *Greyvan* case were required to post bonds with the Company in the amount of $1000 and cash deposits of $250, pending final settlement of accounts. The merchant agents, on the other hand, were not required to post bonds or cash deposits. While prior to 1945 the merchant agent signed an application for bond at the time he also signed the application for employment, this has now been discontinued.[182]

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[181] Similarly, the owner-operators in *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655 (C. A. 6, 1944), referred to at pages 61 and 62 of the Express Agency's main brief, did not deal with the general public, or act as agent for the Trucking Company in the sense that the express commission agents deal with the general public and act as official representatives of the Express Agency in their respective localities. The owner-operators in the *Mutual Trucking* case merely contracted to furnish their own equipment (a tractor and a trailer) and to do the hauling that the Trucking Company had contracted to do for the Universal Car Loading Company, namely to pick up loaded trailers at terminals of the Car Loading Company, after they had been loaded by that Company, and transport the load to a dock of the Car Loading Company at another terminal. For this service the owner-operators were paid a flat rate or lump sum per trip. (See also the District Court's decision in *Mutual Trucking Co.* v. *United States*, 51 F. Supp. 114 (N. D. Ohio, 1943).) Compare: *Western Union Tel. Co.* v. *McComb*, 165 F. 2d 65 (C. A. 6, 1947) *cert. den.* 333 U. S. 862 (1948), in which the Court of Appeals for the same Circuit, held, in 1947, that agents for the Telegraph Company were employees within the meaning of the Fair Labor Standards Act.

[182] At the 1937 hearing, Vice President Owens of the Express Agency, in speaking of the Express Agency's Application for Employment, Form 100, said at page 38:

> "* * * The application itself specifies that under certain conditions it will be an application for a fidelity bond, but actually it is not a fidelity bond in the sense that a surety company prescribes it. The Agency has its own application department to which these go

3753 The Express Agency further contends that there are other factors in the instant case which indicate that it does not have the right to supervise and direct the manner in which the merchant agents perform their work, and that they are "independent contractors" rather than "employees" within the meaning of our Acts. These include the following:

(1) The Express Agency states that the merchant agent engages other individuals to perform or to assist in the performance of the express work, and pays such other individuals out of his commissions without consulting the Express Agency, and it contends that this shows that it does not have control over who performs the work, and that the merchant agent is an independent contractor. In the 1937 and 1938 proceedings the Express Agency made the same argument with respect to the joint agents;[183] however, as previously pointed out, it now concedes that the joint agents who perform their express work on premises under railroad or express agency control are its em-

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> and who investigate the integrity of the individual signing it. That, of course, is the prudent thing to do, because all employees handle the Company's money and valuables and we have to know something about them: but that reference to a fidelity bond does not mean a bond necessarily furnished by an insurance company."

[183] Thus, the Express Agency's attorney, Mr. Hartung, stated in the oral argument presented to Examiner Schoene on January 17, 1938:

> "There is no requirement that the agent perform that duty himself, that a joint railroad agent shall continue that business himself, and as a matter of fact, commonly the agent does not do it himself but someone who works for him does a great deal of that work In many places the railroad agent has his wife in the office to do a great deal of his work and she also handles the express business. In many places the operator works there and he handles the express business." (37 O.A., 9.)

ployees. Likewise, it has also conceded that the individuals regularly employed by the joint agents to assist them in the performance of express work at the railroad station are its employees. Aside from this, however, the courts have often held that individuals who engage other individuals to perform, or to assist them in performing, their work are, nevertheless, employees. Thus, in *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52 (W. D. Mo., 1946) one Sink had a contract with the Greyhound lines to act as terminal operator of its bus depot at Carthage, Missouri, on a commission basis (10%). Sink employed three other persons to assist him in performing the duties incident to the operation of the bus depot. In holding that Sink and his assistants were employees of the Bus
3754 Company under the Fair Labor Standards Act the
Court said at page 56:

> "Mr. Sink, and said other employees, were permitted to work and perform services for defendant that were an integral and essential part of the defendant's interstate business. Consequently Mr. Sink, and said other employees of defendant are, within the meaning of the term 'employee' as contained in the Fair Labor Standards Act, employees of defendant. *Martino* v. *Michigan Window Cleaning Co.*, 66 S. Ct. 379; *Walling* v. *American Needlecrafts*, 6 Cir., 139 F. 2d 60."

In the case of *Tomlin* v. *United States*, 70 F. Supp. 677 (N. D. Calif., 1946) a copartnership owning merchandise vending machines entered into contracts with so-called "supervisors" who each took over a number of machines in a certain territory, and hired men of their own selection, "operators", to service and operate the machines under their directions and to collect and turn in to them the money returns. The court held that both the "supervisors" and the "operators" were employees of the copartnership, and denied its claim for the refund of federal insurance contributions and unemployment taxes. (See also *Tomlin* v.

California Employment Comm., 180 P. (2d) 342 (Calif., 1947), for a similar holding under the State Unemployment Insurance Act.)

And, in *Adams Express Co.* v. *Schofield*, 111 Ky. 832, 64 S. W. 903 (1901), a firm, Owens & McKinney, who acted as agent of the Adams Express Co. (a predecessor of the present Express Agency) at Shelbyville, Ky., furnished at their own expense a driver and horse for the purpose of transferring express shipments between the railroad station and the express office. It was stated in the Court's opinion that the Company had no control over the selection of the driver or the management of the wagon (which was the property of the company). While transporting express, the driver caused injury to a third person, who sued the company. The company contended that the agent was an independent contractor because the agent furnished both the driver and the horse, and the company had no control over the selection of the driver or the management of the wagon, and that the driver was not its employee, of the wagon, and that the driver was not its employee, but an employee of the agent. The court held that both the agent and the driver were employees of the Company. Likewise in *Case* v. *Industrial Commission*, 23 N. E. 2d 652 3755 (Ohio, 1939), one Case had an agency for a laundry company. In conducting this business he furnished his own truck, and paid for the repairs to the truck, and for the oil and gas used in the truck; installed a phone in his home and had it listed in the name of the laundry company, all ~~at his~~ own expense, and paid the wages of a helper he employed from time to time, and all other expenses incurred in the conduct of his laundry work. He was killed while engaged in work for the laundry company, and this proceeding was then brought under the Ohio Workmen's Compensation Act. The Court, after stating at page 655, that "an agent, strictly speaking, is an employee, whose action on behalf of his principal results in binding him in a contractual obligation to a third person", affirmed the lower court decision holding Case to be an employee of the laundry company.[184]

As the Court of Appeals for the Tenth Circuit said in *Jones* v. *Goodson*, 121 F. (2d) 176 (1941), at page 179:

> "The relationship of master and servant may be express or implied; it is not essential that the name of the servant be on the payroll of the master." [185]

Thus, if the employee engages an assistant with the express permission or knowledge and consent of the employer it has been held that there is express authority granted to engage him as the employer's employee, and that he is, therefore, to be regarded as an employee of the employer. For example, in *Michaux* v. *Gate City Orange*
3756 *Crush Bottling Co.*, 172 S. E. 406 (N. C., 1934), it was
held that where the Company's truck driver hired a

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[184] For examples of other cases in which individuals have been held to be employees even though they themselves hired other individuals to perform some portion of the work see: *Stewart-Jordan Distributing Co.* v. *Tobin*, 210 F. 2d 427 (C. A. 5, 1954) *cert. den.* 347 U. S. 1013 (1954); *Western Union Tel. Co.* v. *McComb*, 165 F. 2d 65 (C. A. 6, 1947) *cert. den.* 333 S. 862 (1948); *Ayers* v. *Hobby*, 123 F. Supp. 115 (D. Virginia, 1954); *Karas* v. *Klein*, 70 F. Supp. 469 (D. Minn., 1947); *Walling* v. *McKay*, 70 F. Supp. 160 (D. Nebr., 1946), affirmed in *McComb* v. *McKay*, 164 F. 2d 40 (C. A. 8, 1947); *Waldron* v. *Garland Pocahontas Coal Co.*, 109 S. E. 729 (W. Va., 1921).

[185] Similarly, in *Reynolds* v. *Northern Pac. Ry. Co.*, 168 F. 2d 934 (1948) *cert. den. sub nom* (1948) *Railway Employes Department of the American Federation of Labor* v. *Northern Pacific Railway Company*, 335 U. S. 828, the Court of Appeals for the Eighth Circuit said, at page 942:

> "We agree * * * that for the purposes of the Carriers Taxing Act persons performing services clearly may be regarded as railroad employees, even though they are not directly employed or directly paid by the railroad company, if they otherwise meet the qualifications of the statute."

boy to assist him in distributing the Company's products, with the consent and knowledge of the Company, and paid him out of his own wages or commissions, the boy was an employee of the Company. Likewise, in *Yazoo & M. V. R. Co.* v. *Slaughter,* 45 So. 873 (Miss., 1908), it was held that where the keeper of a railroad pumping station, who desired to absent himself for a short time, placed his 14 year old son temporarily in charge of the station, having told his foreman of such action and received the latter's approval, the son was thereby made a railroad employee. A similar result was also reached in the following cases where there was actual knowledge and consent on the part of the employer: *Lockwood* v. *American Express Co.,* 85 Atl. 783 (N. H., 1913) (an assistant to a joint railroad and express agent held to be an employee of express company although not paid by it and although holding a regular position with a railroad company); *Gathman* v. *City of Chicago,* 86 N. E. 152 (Ill., 1908) (drawbridge attendant employed by city employee with knowledge and consent of city held employee though not paid by it). See also *Schnable* v. *Cleveland, C., C. & St. L. Ry. Co.,* 130 N. E. 510 (Ohio, 1921). In that case a railroad company, after having refused to employ a helper for a station agent, gave the agent permission to take into his office a person to learn telegraphy and to assist the agent in performing his duties. The agent thereupon took into his office one Schnable who, while engaged in assisting the agent in his railroad service, was injured. Schnable sued the railroad company. The lower court non-suited the plaintiff. On appeal, this Judgment was reversed, the court holding that there was sufficient evidence to take to the jury the question whether plaintiff, Schnable, was an employee of the railroad company.

Even where no actual permission to engage an assistant is given an employee by an employer or where there is no

showing that an employer had actual knowledge of and consented to the employing of an assistant, the facts may still warrant the conclusion that the employer had impliedly granted permission to engage an assistant or
3757 that the employer had implied knowledge thereof and
had impliedly consented thereto. See *Haluptzok* v. *Great Northern Ry. Co.*, 57 N. W. 144 (Minn., 1893), cited with approval in *B. & O. S. W. RR.* v. *Burtch*, 263 U. S. 540, 544 (1924). Such implied authority may be found from the nature of the work to be performed, from the general course of conducting the business of the master by the servant, or from the circumstances of the particular case. *Monetti* v. *Standard Oil Co.*, 195 So. 89 (La., 1940).

(2) The Express Agency contends that the merchant agents are entrepreneurs with respect to their operations, and that the express service rendered by them is a service which they render their community along with the other services which are part of their whole business enterprise.

There is nothing in the Railroad Retirement or Railroad Unemployment Insurance Acts which even indicates that an individual may escape, or is withdrawn from, coverage simply because he happens to be engaged in some business activity or activities in addition to his work for an employer as defined in the Acts. To the contrary, as previously pointed out, the legislative history of the Acts indicates that Congress was cognizant of the fact that railroad agents also sometimes represent the express agency, and that many part-time employees under our Acts are engaged primarily in other occupations, and that it intended that these individuals be covered under our Acts with respect to their work for the employers covered by such Acts.

In *Western Union Tel. Co.* v. *McComb*, 165 F. (2d) 65 (C. A. 6, 1947), *cert. den.* 333 U. S. 862 (1948), the Telegraph Company, like the Express Agency in this case, argued that certain of its agents were independent contractors, and that their employees were not, in fact, employees of the Telegraph Company. In that case the Telegraph Company had established so-called "9A agencies" in various local establishments, such as a hotel, drug store, bus station, insurance office, etc., under a commission and delivery allowance arrangement, and either the establishment or some person therein was carried on the Company's records as the agent at the particular office. The Telegraph Company, through its representatives, was cognizant that certain individual agents did not participate in the transaction of its business, and that such agents had employed others as operators. The Court said, at page 71:

3758 > "Certainly, workers in an agency office of the telegraph company are not withdrawn from coverage of the Fair Labor Standards Act for the reason that some of them are engaged in local retailing work in addition to telegraphic work, or because of the location of the telegraph office in a retail or service establishment."

It is, of course, true that one of the conventional tests of employer-employee relationship is whether the individuals in question are engaged in a distinct occupation or business. This test is designated as the independent calling test. Under it, the employment relationship exists where the individuals do not pursue an independent calling, profession or occupation in which services are offered to the general public as a part of the individual's independent calling, profession or trade.[186] However, the fact that a merchant agent (like some of the other commission

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[186] For example, physicians, certified public accountants, lawyers, dentists, optometrists, public stenographers, auctioneers, and others who follow an independent trade or business or profession, in which they offer their services to the public are generally independent contractors and not employees.

agents who are conceded to be employees) is engaged in an independent business, trade or profession of his own is no indication that he is independent with respect to the manner in which he performs his express work.[187] The conducting of an independent business by a person engaged to render service is a factor indicating independence with respect to that service only when the service is of the same kind as the business in which the person is independently engaged.[188] In the case of *Pittsburgh Valve Foundry & Construction Co.* v. *Gallagher*, 32 F. (2d) 436 (C. A. 6, 1929), Gallagher who was employed as a
3759 laborer and who was also employed for an agreed compensation to transport other workmen in an automobile furnished by him, was held to be an employee and not an independent contractor with respect to his transportation service. In its opinion the court said that one of the factors to be considered in determining whether a "master and servant" relationship existed was, "whether the alleged independent contractor is in fact engaged in

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[187] As the court said in *MacMillan* v. *Montecito Country Club*, 65 F. Supp. 240 (S. D. Calif., 1946), at page 242:

> "* * * a person may be held to be in the employ of another, although, while performing certain services for the employer, he also performs services for himself, thus occupying a dual role. See, Restatement of Agency, § 236."

[188] Thus, in *Roth* v. *Harrison*, C. C. H. Railroad Retirement Reports P 4125 (N. D. Ill., 1946, Civil No. 44-C-456) a railway company was held liable for taxes under the Carriers Taxing Act with respect to wages paid by it to mail carriers engaged in transporting mail between railway stations and post offices, except with respect to the earnings of certain draymen who were also engaged in transporting mail. The Court held that the mail carriers, except the draymen, were employees. In its findings the Court stated that the mail carriers, except the draymen, did not hold themselves out as being engaged in an independent calling or occupation in which their services as mail carriers were available to the public generally.

ny distinct business or occupation (such as building,
ransportation by rail, street car, or bus, general contract-
ing, etc.) *in the field in which he contracts*". Em-
3760 phasis supplied).[189] In the instant case, it is clear,

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189. In this and other respects, the instant case is
learly distinguishable from such cases as *Martin* v. *Fed-*
ral Security Agency, 174 F. (2d) 364 (C. A. 3, 1949) (Ex-
ress Agency's Main Brief, p. 51); *Reynolds* v. *Northern*
ac. Ry. Co., 168 F. (2d) 934 (C. A. 8, 1948) *cert. den. sub*
om. Railway Employes Department of the American Fed-
ration of Labor v. *Northern Pacific Railway Company*,
35 U. S. 828 (1948), (Express Agency's Main Brief, pp.
5, 47, 48, 51, and 60); *Kelm* v. *Chicago, St. P. M. & O. Ry.*
o., 206 F. (2d) 831 (C. A. 8, 1953), affirming *Chicago, St.*
aul, Minneapolis & Omaha Ry. Co. v. *Kelm*, 104 F. Supp.
45 (D. Minn., 1952) (Express Agency's Reply Brief, p.
3); *Nicholas* v. *Denver & R. G. W. R. Co.*, 195 F. (2d)
28 (C. A. 10, 1952) (Express Agency's Reply Brief, p.
3). The *Martin* case was primarily a case of statutory
onstruction involving the question of whether the Western
tevedoring Company for whom the decedent, Martin, had
orked was an "employer" under the Railroad Retire-
ment and Carriers' Taxing Acts, or whether it was an
ndependent contractor in its relationship to the Pennsyl-
ania Railroad Company, in which case its employees, such
s Martin, would be within the coverage of the Social
ecurity Act. The Court held that the Stevedoring Com-
any was not an "employer" under the Railroad Retire-
ment and Carriers' Taxing Acts, but was an independent
ontractor in its relationship to the Railroad, and that,
onsequently, he was within the coverage of the Social
ecurity Act and his widow and children were therefore
ntitled to benefits under that Act. It is clear that the
tevedoring Company was engaged in a distinct business
r occupation, stevedoring, in the field in which it con-
racted with the Railroad. (See also the District Court
ecision in 73 F. Supp. 482 (W. D. Pa., 1947).) The *Rey-*
lds case, which arose under the Carriers' Taxing Act of
937 (now Railroad Retirement Tax Act), involved the
uestion of whether personnel employed by the Addison
Miller Company and the A. W. Partridge Co. to assist them
n operating boarding camps for railroad employees under
ritten contracts between the Miller and Partridge Com-

for example, that the Express work performed by Agents Schreiber and Westfall is not a phase of their retail drug

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panies and the Northern Pacific Railway Company, were, in fact, employees of the Railway Company, and thus within the coverage of the Carriers' Taxing and Railroad Retirement Acts, or whether they were, instead, employees of the Miller and Partridge Companies and thus within the coverage of the Social Security and Federal Insurance Contributions Acts. The Court held that they were not Railroad employees, and hence not within the coverage of the Carriers' Taxing Act. The Partridge Company was engaged in the business only of furnishing boarding camp services to railroad companies and others under contracts, and the Miller Company was engaged in the business of furnishing boarding camp and general services to railroads under contracts. It is clear, therefore, that the Partridge and the Miller Companies were both engaged in a distinct business or occupation in the field in which they contracted with the Northern Pacific Railway Company. As the Court of Appeals said in the *Reynolds* case, at p. 936:

> "* * * the record hardly affords room to question that the activities of the Miller Co. and of the Partridge Co. both had the dignity and status of actual business enterprises. The operations and contract relationships of each company extended throughout the northwest and the middle west and they were not confined to any particular railroad. Both companies had business offices, business staffs, business organization, business capital and business risks."

The *Kelm* case, which arose under the Railroad Retirement Tax Act, involved the question of whether personnel employed by the Shipley Company to assist them in performing such services as placing coal in bins or chutes along the railroad tracks for use in locomotives, coaling locomotives, storing ice, icing refrigerator cars, servicing heaters in such cars, cleaning freight cars, transferring shipments from bad order cars and unloading livestock for feed, water and rest, and reloading the same, under contracts with the Chicago, St. Paul, Minneapolis & Omaha Railway Company, were, in fact employees of the Railway, and thus within the coverage of the Railroad Retirement and Railroad Retirement Tax Acts, or whether the Shipley Company was, in fact, an independent contractor in its

usiness, and that they do not perform such express work
ı pursuance of their profession as druggests.

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elationship to the Railway Company. The Court held
nat the Shipley Company was an independent contractor,
nd that the individuals in question were not employees
f the Railway Company within the meaning of the Rail-
oad Retirement Tax Act. The Shipley Company had
een engaged in rendering contract services to railroads
nce 1923 (*Reynolds* v. *Chicago, St. P. M. & O. Ry. Co.*,
8 F. 2d 943 (C. A. 8, 1948), and it is clear that it was,
erefore, engaged in a distinct business or occupation in
e field in which it contracted with the Chicago, St. Paul,
inneapolis & Omaha Railway Company. The *Nicholas*
se, which arose under the Carriers' Taxing and Rail-
ad Retirement Tax Acts, involved the question of
hether one Lamberg, the lessee of certain railroad stock-
rds, and the individuals assisting him in the perform-
ce of such work, were employees of The Denver and Rio
rande Western Railroad Company, or whether Lamberg
as an independent contractor in his relationship to the
ailroad Company. The Court held that Lamberg was an
dependent contractor, and that neither he nor his em-
oyees were employees of the Railroad Company within
e meaning of the Acts in question. Lamberg had oper-
ed the stockyards under lease agreements at three dif-
rent points since 1932, and at another point since 1934.
is stockyard activities were, however, not confined to
estock moving in transit. As the Court said, at page
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> "Some livestock not being shipped by the railroad company was handled in the yards. Formerly stock being driven from range to range frequently was cared for in the yards, and later shipments moving by truck were stopped, cared for, and their movement resumed. In addition, Lamberg conducted a feeding operation of livestock for shippers and patrons; and he rendered other service in the nature of branding, disinfecting, or anything else incidental to the care and handling of livestock, whether local or transient or terminating in the yards."

is clear from the foregoing that Lamberg was engaged
a distinct business or occupation in the field in which he
d contracted with the Railroad Company.

(3) The Express Agency contends that it has no
3761 power to discipline or discharge the merchant
agents.[190] However, it made the same contentions in the 1937 and 1938 proceedings with regard to the joint agents,[191] and, as previously pointed out, the Supreme

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[190] Although the Express Agency contends that it cannot discharge the merchant agents, its states that it can "discontinue the arrangement," "discontinue the agency", "discontinue his [the agent's] services", or "cancel the arrangement". It may be noted, however, that the end result is the same whether it be said that the agent was discharged, or that the Express Agency merely discontinued the arrangement, the agency, or the agent's services, or that it cancelled the arrangement or severed its relationship with the agent. No matter which phraseology is used the fact remains that the agent's connection with the Company has been terminated, and that he is thereafter no longer an official representative of the Express Agency in his locality. In connection with an employer's power to terminate the relationship with his employee, the Supreme Court of South Dakota said in *Cockran* v. *Rice*, 128 N. W. 583, 585 (1910):

> "No single fact is more conclusive as to the effect of the contract of employment, perhaps, than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of the work itself."

For similar holdings see also: *Bowen* v. *Gradison Const. Co.*, 32 S. W. (2d) 1014, 1017 (Ky., 1930); *Industrial Commission* v. *Bonfils*, 241 P. 735, 736 (Colo., 1925); *Halverson* v. *Sonotone Corporation*, 27 N. W. (2d) 596, 599 (S. D., 1947); *Bandt* v. *Farmers Co-op. Elevator Co. of Revillo*, 5 N. W. (2d) 897, 898 (S. D., 1942).

[191] With respect to this contention Examiner Schoene stated in the Examiner's Second Report, p. 22:

> "It is normally characteristic of contracts establishing an independent contractor relationship that they may be terminated for breach, by mutual consent, or in accordance with terms agreed upon in the contract itself; it is normally characteristic of the master and servant relationship that it may be terminated upon the will of either party with or without cause; in either case the relationship is basically contractual and the

urt of the United States has since stated, and the Ex-
ss Agency has conceded, that the joint agents are its
ployees. Aside from this, however, it is clear that the
press Agency actually has the right to discharge the
rchant agent by the simple device of taking the work
ay from him. That this is so is shown by the testimony
Superintendent Huff at the 1938 hearings, and Super-
endent of Organization Lace at the 1948 hearings.[192]
the 1938 hearings Mr. Schreiber asked Mr. Huff whether
Express Agency would "discontinue the relationship"
h the merchant agent if he didn't watch the train sched-
s, and get "someone else who would" watch the sched-
ules, and he replied "That is right." (38R, 36.) In
2 the 1948 hearings Mr. Lace, in answer to questions
by Vice President Morgan of the Clerks, testified as
ows, at page 382:

> "Q. No. 8 comes in at three-fifty-nine, and he [the merchant agent] is the only man there. Is he free to use his discretion as to whether he meets that train at three-fifty-nine or otherwise?
>
> "A. No, he is not.
>
> "Q. What do you mean by 'he is not'?
>
> "A. He is not free to use his discretion.
>
> "Q. That is, he must meet No. 8 at that time *if he expects to hold that office.* Is that correct? (Emphasis supplied).
>
> "A. That's right."

s previously indicated, the power to terminate the rela-
ship at any time has been held to be strongly indicative
an employee relationship. Thus, in *Los Angeles Ath-
c Club* v. *United States,* 54 Supp. 702 (S. D. Calif.,
4) the Court said, at page 704:

Express Agency's reference to the discharge of a joint agent as 'termination of the contract' does not distinguish the transaction in any way from the discharge of an ordinary employee."

92. See also the testimony of Vice President Hall at
ge 417 of the 1948 hearings.

> "* * * inasmuch as the right to control and direct the method and manner of doing the work necessarily involves the power to discharge, the existence or absence of this right on the part of the employer is a factor which strongly indicates the relationship involved in different situations. *Williams* v. *United States*, 7 Cir., 126 F. (2d) 129; *Jones, Collector* v. *Goodson, supra,* 39 C. J. 35, 35 Am. Jur. 445."

(4) The Express Agency refers to the Social Security Amendments which brought the self-employed business man under Social Security coverage, and urges that both as a matter of law and practical administration the merchant agent should not have to apportion his time and compensation, and that of his assistants, as between the two Acts, but should instead be controlled by one welfare Act, the Social Security Act, with respect to all his 3763 business operations.[193] According to the Express

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[193] Similarly, in Jurisdictional Docket No. 12, "In the matter of the status of the Union Pacific Coal Company under the Railroad Retirement and Railroad Unemployment Insurance Acts", the Coal Company placed considerable emphasis on certain practical considerations. In its opinion adopted May 31, 1940 (B. O. No. 40-299), the Board said at pp. 11-12:

> "A great deal of the record in this case is devoted to a presentation of practical considerations relating to possible effects of the Board's ruling on the employees concerned. Most of these considerations, it may be observed, involve aspects of the possible application of the Carriers Taxing Act of 1937 (now Sub-chapter B, Chapter 9, of the Internal Revenue Code) and of the Railway Labor Act, both of which acts are without the Board's province. As for the rest, such as the differences in characteristics between coal miners and train employees, we are unable to find anything in the Acts which would endow such elements with relevance or materiality in the determination of whether a particular coal mining company is an 'employer' within the terms of the Acts. *The coverage provisions of the Acts must be, of course, applied according to their terms in deciding the eligibility of an applicant for*

ency, a contrary holding will invite additional weight the already heavy demand that the Railroad Acts be rged with the Social Security Act."

he fact that an express agent and/or his assistants, the case may be, performs some service covered by the ial Security Act does not, of course, prevent him or m from being covered under the Railroad Retirement l Railroad Unemployment Insurance Acts with respect other services which are properly employee services ler such Acts.[194] In the Board's Annual Report for 2 it was pointed out that millions of individuals have l both railroad retirement and social security employnt. Thus, the Report states at pages 109-111:

> "About 6,400,000 employees had both railroad and social security employment in the period 1937-50. They made up 76 per cent of the 8,400,000 employees with some railroad service during those years. Of special interest is the fact that, as shown below, only

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benefits under the Acts, and the Board is given no discretion under the Acts to deny creditability to service covered by those provisions, which means that the practical effects flowing from an 'employer' coverage ruling made in accordance with the Acts are matters which must be referred to Congress." (Emphasis supplied).

its opinion in the *Union Pacific Coal Company* case, erred to above, the Board stated that it had prepared islation which would exclude from the coverage of the s all coal mining companies and the individuals employed coal mining operations (p. 112), and that during the idency of such legislation it would not enter any order the case. By Public Law No. 764, 76th Cong., Ch. 664, Sess., Congress removed the coal companies and the ividuals employed in coal mining operations from the erage of the Railroad Retirement and Railroad Unemyment Insurance Acts.)

94. See *United States* v. *Pacific Electric Ry. Co.*, 157 F.) 902 (C. A. 9, 1946) *cert. denied* 330 U. S. 849 (1946), l *Los Angeles Ry. Corp.* v. *Department of Employment*, P. (2d) 366 (Calif., 1947).

27 per cent of those with 10 or more years of railroad service in 1937-50 had social security employment, compared with 82 per cent of those with less than 10 years.

"Even in the course of a single year, many persons
work under both systems. In 1950, 25 per cent of the
railroad employees also had social security employ-
ment in the same year. In 1949, the proportion with
764 dual coverage was 27 per cent, and, in 1948, 29 per
cent. These percentages are markedly higher than
the corresponding figures of 13 and 16 per cent in the
early years 1938 and 1939, respectively.

* * * * *

"Most dual-coverage employees had only short periods of railroad service (counting only service after 1936). About two-fifths had been in railroad service for 3 months or less, and three-fourths, for 18 months or less. Only 4 per cent had as much as 10 years of service. The social security employment of these employees was much more substantial. About 12 per cent had acquired 40 quarters of coverage, 33 per cent, 20-39 quarters, and 36 per cent, 6-19 quarters. Thus, over 80 per cent were insured under the Social Security Act as of January 1, 1951, on the basis of social security employment alone.

"Large proportions of employees who worked under both systems in the same year were credited with only small amounts of earnings under each system separately. In 1950, about 48 per cent of the dual-coverage employees had less than $600 in railroad compensation, and only 9 per cent, $3,000 or more. The corresponding figures for earnings under social security were 47 per cent and 2 per cent. However, the combination of railroad and social security earnings put many of them into the higher earnings brackets. Only 15 per cent of the total had less than $600 in combined earnings, but 25 per cent earned $3,000 or more. Data for employees who worked under both systems in any of the earlier years are similar to those for 1950.

"The employees with dual coverage in 1937-50 tended, as their service distribution suggests, to earn much more under the social security than under the

ilroad retirement system. When all their taxable
rnings are considered, about 45 per cent of them
ceived less than $300 in railroad compensation, and
ly 9 per cent as much as $15,000. In contrast, only
per cent had less than $300 in social security earn-
gs, but 19 per cent had at least $15,000. * * *''

clear from the foregoing that many railroad workers
oth railroad and social security employment in the
ear, and that their social security employment dur-
e year often exceeds their railroad employment.
when the worker's employment under one Act is so
as to be almost inconsequential the Courts have held
ie individual is, nevertheless, entitled to coverage
that Act with respect to such service. For example,
recent case of *Adams* v. *Railroad Retirement Board*,
(2d) 534 (C. A. 9, 1954). That case involved the
on of whether the service which certain individuals
med for an "employer" company while carried on
yroll of a subsidiary non-employer company was,
heless, creditable as "employee" service under the
ailroad Retirement Act. The record showed that the
on-employer subsidiary charged to the "employer"
sum of money representing the portion of the salary
se individuals which was attributable to the work
they performed for the "employer" company. In
ing its ruling that this service was not creditable the
pointed out at page 19 of its brief (the *Adams* case
L-53-554) that "In those cases in which charges
nade to Power [the 'employer' company], the serv-
ere for the most part so small that the claimed com-
ion ran from from a few cents to a few dollars per
per individual", and that the services which the
ployer company performed for the "employer"
ny were "so inconsequential that the individuals in
on were able to and did perform them as a part of
regular work for Electric [the non-employer com-

any]". The Board also stated, at pages 20-21 of its brief ı the *Adams* case:

> "That Electric [the non-employer company] supplied the services in question to Power [the 'employer' company] as a part of its own operations, with its own employees, is also shown by the following facts. The individuals involved were employed by Electric and subject to discharge by Electric. They were carried on Electric's pay roll and received their entire compensation by check of Electric * * * They worked on or out of the premises and property of Electric and used the facilities provided by Electric * * * Their wages and working conditions were fixed by Electric; separate wage negotiations were carried on with different labor organizations by Electric and Power; and separate wage scales were established applying to the entire compensation of their respective employees, including any portion charged to the other company".

lthough the individuals in question were covered by the ocial Security Act with respect to their services for the on-employer company, and although their services for the employer" company were "inconsequential" and were erformed as a part of their regular work for the non- nployer company, the Court of Appeals for the Ninth 'ircuit held that these individuals were, nevertheless, employees" under the Railroad Retirement Act with re- pect to the service rendered for the "employer" com- any.

It is, of course, true that the Courts have often disre- arded very small amounts, or insubstantial measures of ime and effort, under the maxim "de minimis" or "de ninimis non curat lex", even though the statute involved contains no restrictions as to volume, and even though 766 the small amounts, or insubstantial measures of time and effort, are actually identifiable. An excellent iscussion of the application of this maxim is found in *'rank* v. *Wilson & Co.*, 172 F. (2d) 712 (1949), *cert. denied*

918 (1949), where the Court of Appeals for the
ircuit, in discussing the maxim, said at page 716:
he Supreme Court tells us that activities are de
nis which involve only 'insubstantial and insignifi-
periods of time. *Anderson* v. *Mt. Clemens Pot-*
Co., supra, 328 U. S. at page 693, 66 S. Ct. at page
90 L. Ed. 1515. Also, 'it is only when an employee
quired to give up a substantial measure of his
and effort that compensable working time is in-
d.' *Anderson* v. *Mt. Clemens Pottery Co., supra*,
. S. 692, 66 S. Ct. at page 1195, 90 L. Ed. 1515.
de minimis rule, the court says, is 'justified by
tualities of working conditions * * * the realities
e industrial world,' and 'by the policy of the Fair
r Standards Act.' It is thus apparent that no
rule can be laid down with mathematical cer-
y as to when the de minimis rule applies. Each
tion presented must be examined in the light of
is 'substantial' and 'reasonable' in view of all
actors present. Here, not more than five minutes
is involved. The checking in at the time clock,
eceiving of instructions from supervisory per-
l, the obtaining of tools from tool chests and
ets, and the walking to the place plaintiffs were
red to be are similar to the preliminary activities
were held governed by de minimis in the Mt.
ens case.

e have concluded that the overtime activities
in question are clearly de minimis under the
ine of *Anderson* v. *Mt. Clemens Pottery Co., supra*,
hence are not compensable.

llustrative of other cases decided since the opinion
nderson v. *Mt. Clemens Pottery Co., supra*, was
unced, and the length of time consumed in pre-
ary activities or walking time, and all of which
been held to be de minimis, are: *McIntyre* v.
h E. Seagram & Sons, Co., D. C., 72 F. Supp.
(10-20 minutes); *McComb* v. *C. A. Swanson &*
D. C., 77 F. Supp. 716 (10-11 minutes); *Lasater* v.
ules Powder Co., D. C., 73 F. Supp. 264 (possibly
inutes). To the same effect, see: *Timmons* v.

> *Wagoner County Coal Co.*, 13 Labor Cases, Par. 64,006; *Tully* v. *Joshua Hendy Corp.*, 15 Labor Cases, Par. 64,696.''[195]

However, it appears that it would not be proper to apply these maxims in cases arising under our Acts where the service and the compensation attributable thereto are identifiable, and would otherwise be creditable under
3767 such Acts.[196] That this is so is indicated by the decision in *Adams* v. *Railroad Retirement Board*, 214 F. (2d) 534 (C. A. 9, 1954). As was pointed out above, the service in that case was ''inconsequential'' and the compensation ''ran from a few cents to a few dollars per month per individual'', yet the Court of Appeals for the Ninth Circuit held that such service and compensation were creditable under the Railroad Retirement Act. Aside from the *Adams* case, however, the Acts themselves, and their legislative history, indicate that it was the intent of Congress that all identifiable service and compensation would be creditable, unless specifically exempted from coverage by Congress. For example, Section 1(g) of the Railroad Unemployment Insurance Act of 1938 (Public

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[195] Another excellent discussion of the maxim ''de minis'' or ''de minimis non curat lex'', can be found in *Wiley* v. *Stewart Sand & Material Co.*, 206 S. W. (2d) 362, 367-368 (Missouri, 1947). See also *Labor Board* v. *Fainblatt*, 306 U. S. 601 (1939), and *Wabash Radio Corporation* v. *Walling*, 162 F. (2d) 391 (C. A. 6, 1947).

[196] As was stated in the Examiner's Second Report (Jurisdictional Docket No. 2) pages 30-31:

> ''* * * the Act does not draw any line between 'small' compensation and compensation which is not 'small', and it would obviously be impossible for the Board to attempt to draw such a line. Furthermore, the Act evidently contemplates small amounts of compensation in view of the minimum annuity provisions of Section 3(e) and in view of the provisions of Section 3(i) [now 3(h)] with respect to the payment of annuities of less than $2.50.''

Law No. 722, 75th Cong., 3d Sess., approved June 25, 1938) provided simply that:

> "The term 'employment' means service performed as an employee".

This section was amended by Public Law 833, 76th Cong., 3d Sess., approved October 10, 1940, by adding thereto the following sentence:

> "For the purposes of determining eligibility for and the amount of benefits and the amount of contributions due pursuant to this Act, employment *after June 30, 1940* in the service of a local lodge or division of a railway-labor-organization employer or as an employee representative shall be disregarded." (Emphasis supplied).[197]

Similarly, Public Law No. 833 also amended Section 1(h) of the Railroad Retirement Act of 1937 by providing that:

> "For the purposes of determining monthly compensation and years of service and for the purposes of subsections (a), (c), and (d) of section 2 and subsection (a) of section 5 of this Act, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof
> 3768 is less than $3 and (1) such compensation is earned between December 31, 1936, and April 1, 1940, and taxes thereon pursuant to sections 2(a) and 3(a) of the Carriers Taxing Act of 1937 or sections 1500 and

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[197] In explaining the reasons for this amendment the Senate Committee on Interstate Commerce stated in its report (Senate Report No. 1752 on S. 3920, Public Law No. 833, 76th Cong., 3d Sess.), page 7, that:

> "Section 2 of the bill provides that, for benefit and contribution purposes, employment after June 30 1940, in the service of a local lodge or division of a railway-labor-organization employer or as an employee representative shall be disregarded. It is believed that any additional unemployment insurance benefits which might be payable upon the basis of compensation from such service do not justify the administrative difficulties and expense connected with the collection of contributions based on such compensation."

> 1520 of the Internal Revenue Code are not paid prior to July 1, 1940; or (2) such compensation is earned after March 31, 1940.''[198]

The Congressional intent that these maxims are not aplicable to service and compensation, otherwise creditable, is also indicated by the language of the first proviso of Section 1(k) of the Railroad Unemployment Insurance Act which states that:

> ''* * * 'subsidiary remuneration', as hereinafter defined in this subsection, shall not be considered remuneration for the purpose of this subsection *except* with respect to an employee whose base-year compensation, exclusive of earnings from the position or occupation in which he earned such subsidiary remuneration, is less than $400.'' (Emphasis supplied)

Section 1(k) also provides that:

> ''For the purpose of this subsection, the term 'subsidiary remuneration' means, with respect to any employee, remuneration not in excess of an average of one dollar a day for the period with respect to which such remuneration is payable or accrues, if the work from which the remuneration is derived (i) requires substantially less than full time as determined by generally prevailing standards, and (ii) is susceptible of performance at such times and under such circumstances as not to be inconsistent with the holding of

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[198] In explaining the reason for this amendment the then Chairman of the Board, Mr. Murray W. Latimer, testifying at page 116 of the hearings on S. 3920 (which became Public Law 833) stated that:

> ''Section 28 [S. 3920] suggests an amendment to the carriers taxation act of the Railroad Retirement Act which would eliminate part of the local problem which we have. There it is undesirable to eliminate all employment with local lodges. Six months of service may be beneficial to the employee. But it does seem desirable to cut out pay under $3 a month, since that would eliminate a large part of these nominally paid secretaries who never lose any time from the railroad, and for whom the tax collection is too great to be worth what it costs.''

769 normal full-time employment in another occupation.''[199]

(5) In the course of the 1937, 1938, and 1948 proceed-
igs the Express Agency also called attention to a number
f other matters which it apparently believed would support
s contention that the merchant agents and their assist-
nts are not Express Agency employees. These include
ie following:

> The merchant agent has the key to his place of business to the exclusion of all other representatives of the Express Agency.

It seems rather obvious that an agent who is also engaged
some independent business activities of his own in the
ame building as the express office might not wish to let
nyone else have a key to the premises. For example,
jeweler, with diamonds or other valuable merchandise
hand, or a druggist, with various narcotics on hand,

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199. In its report on S. 3920 (Public Law No. 833) the
enate Committee on Interstate Commerce, in referring to
ie subsidiary remuneration amendment stated, at page 5:

> "Section 5 of the bill also contains an amendment to the definition of 'day of employment' which is designed to encourage individuals to retain or to seek odd jobs or part-time work, by permitting to be counted as days of unemployment days for which subsidiary remuneration averaging not more than $1 a day is payable or accrues. This may be done, however, only in the cases of claimants who have $150 [now $400] or more in base-year compensation, *exclusive* of the earnings from the position or occupation in which such subsidiary remuneration was earned. Subsidiary remuneration is that derived from work which requires substantially less than full time and can be performed while a person is holding a normal full-time job in another occupation. The amendment with respect to it will prevent service for nominal salaries to labor organizations, fraternal organizations, and the like, from interfering with the receipt of unemployment insurance benefits." (Emphasis supplied.) (Senate Report No. 1752, 76th Cong., 3d Sess.)

might naturally be reluctant to furnish any other representative of the Express Agency with a key to the premises. The agent's refusal, under such circumstances, to furnish other representatives of the Express Agency with a key to the premises would, however, have little or no bearing on whether his relationship to the Express Agency, in the performance of his express work, was that of an
3770 employee or an independent contractor.

b. The merchant agents and their assistants do not wear Express Agency uniforms.

The record does not show, for example, that the joint railroad-express agents, who are conceded to be Express Agency employees, are required to wear an Express Agency uniform. Moreover, Rule 827 of the "General Rules and Instructions", in referring to the wearing of uniforms by employees, merely states that "When on duty they should wear such uniforms as *may* be required." (Emphasis supplied.)

c. The Express Agency has never reported the merchant agents and their assistants to the Interstate Commerce Commission as employees.

The same is also true with respect to the joint railroad-express agents who have been conceded to be Express Agency employees.[200] As was stated in the Examiner's First Report, pp. 31-32:

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[200] During the course of the 1948 proceedings the Telegrapher's attorney, Mr. Hassenauer, asked General Auditor Gross of the Express Agency whether the Agency intended to report the joint agents to the Interstate Commerce Commission as employees. In explaining his statement that the Express Agency did not intend to report the joint agents to the Commission as employees, even though it had conceded that they were employees for the purpose of the proceedings under our Acts, Mr. Gross stated, at pages 546-547 of the 1948 hearings:

> "The fact that the joint agents have never been reported to the Interstate Commerce Commission as employees does not necessarily indicate that the Express Agency did not consider them employees under the
> 71 regulations of the Interstate Commerce Commission, because it may have had some other reason for not reporting them. Furthermore, even of the Express Agency did not consider them as such employees, the question at issue is not whether they were so considered, but whether they were *in fact* subject to the continuing authority of the Express Agency to supervise and direct the manner of rendition of their service and this fact depends upon the *agreement* between the Express Agency and those agents, *in the light of all the circumstances.*"

xaminer Schoene's remarks with regard to the joint ents, quoted above, are equally applicable to the mer- ant agents and their assistants.

> "* * * salaried employees are the only employees whose time and compensation we include in the wage statistics which we supply to the Interstate Commerce Commission, and the only compensation which is included in the wage accounts, of which there are some dozen or more, which we report to the Interstate Commerce Commission, whereas the joint railroad-express agents are compensated on a commission basis and the compensation is properly chargeable to an I. C. C. account prescribed by that commission, Account No. 39, titled 'Commissions', in which we would include the compensation we pay to joint railroad-express agents. The compensation which we pay to joint railroad-express agents varies considerably. There is no stipulated sum per month which we pay to those individuals. Their compensation is on the basis of commissions, generally of 10%. In some cases, the joint railroad-express agency may receive a very small amount of commission; in other cases, it would be larger. If we were to include in our wage statistics reported to the I. C. C. the compensation we paid joint railroad-express agents, we would entirely distort our wage statistics reported to the Commission."

d. The Express Agency states that the payments to the merchant agents cover the work performed by the agent and his assistants, the use of the premises where the agency is operated, and such facilities as the telephone, light, heat, insurance, etc., and that the agents do not always deduct the cost of these items in reporting their net commissions.[201]

In the 1937 and 1938 proceedings the Express Agency made a similar contention regarding both the joint agents (now conceded to be express employees) and the merchant agents. With respect to this contention the Examiner's Second Report contains the following statement at pages 31-32:

3772 "As for the deductions which the Express Agency states would have to be made in order to determine the agent's net compensation, the Board has hereto-

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[201] Although the Express Agency points out that the merchant agents do not always deduct any expenses in reporting their net commissions for Railroad Retirement Tax purposes, it should be noted that some agents apparently do make such deductions. For example:

Agent	Location	1947 Gross Commission	1947 Net Commission
E. W. Gerrish	Brownville, Maine	$1247.11	$ 623.11
C. E. McKusich	Guilford, Maine	2389.17	1729.17
J. C. Broughton	Conway, N. H.	2944.97	2417.01
R. C. Kimball	Middleburg, N. Y.	3180.74	2640.74
H. C. Kendall	Richford, Vermont	2844.07	1531.19
W. A. Mills	Antioch, California	5350.10	1550.76
R. J. Stadler	Hermosa Beach, Calif.	5809.07	1304.31
C. D. Schreiber	Tell City, Indiana	4042.92	2871.65
L. C. Jordan	Fremont, Michigan	4132.74	3018.90
H. E. Miille	Ponca, Nebraska	380.54	344.54
J. H. Webb	Paulding, Ohio	2346.20	2105.62
Viola M. Vincent	Lakeview, Oregon	2719.51	2350.55
C. A. Keene	Spearfish, South Dakota	2680.34	1572.16
J. H. Danser	Port Angeles, Wash.	9528.22	3083.48
I. N. Doolittle	Aylmer, Ontario	614.33	282.91
E. A. Grouby	Prattville, Alabama	3546.69	2030.41
H. R. Smith	Bolivar, Missouri	3948.37	3220.17
C. W. Salisbury	Lewisburg, West Va.	4709.70	1544.89

(The above data was taken from the Express Agency's Exhibit XXXIB.)

> fore ruled that expenditures by an employee out of his gross compensation for the services of assistants, or materials and supplies, in connection with the employee's service as an employee, are to be deducted in determining the net compensation which is creditable. In determining the net compensation of joint agents and merchant agents, it does not appear that any unusual difficulty will be encountered. As shown in the Examiner's original report, and again in the next to the last paragraph above, the joint agent does not furnish premises to the Express Agency, but the Express Agency itself secures the use of the premises from the railroad company. In the case of the merchant agent, who does furnish the use of premises, the record shows that he does not receive any rent or other payments for these premises, since his rate of compensation (normally 10%) is exactly the same as that of the joint agent who does not furnish the use of premises and whose duties with respect to express service are no different from those of the merchant agent. Therefore, no deduction on account of rental value is to be made. Likewise, no deduction is to be made on account of services performed gratuitously by relatives or friends of the agent, because in such cases it is clear that all of the express commissions represent compensation for the agent's personal services. Such cases are no different from the case of an exclusive *commission agent*, or other *admitted employee*, who happens to have a relative or friend gratuitously assist him in rendering his service for the employer. Nor is any deduction to be made on account of persons in the agent's general employ who happen to do some work for the agent in connection with the agent's express service.''[202]

As indicated above, the amounts reported to the Express

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202. One of the agents who testified in the 1948 pro-
edings, *Agent Burns* at Sparta, Illinois, was paid a sepa-
te rental allowance of $10 a month for the use of the
ace where the express shipments were stored in his build-
g. This separate rental allowance is, of course, not
editable compensation under our Acts.

Agency as expenses incurred in the performance of a commission agent's express work are not creditable under the Acts. This is true irrespective of whether the agent is or is not an admitted employee of the Express Agency.[203]

e. The merchant agent accepts checks in payment of express charges drawn to his order without consulting the Express Agency.

3773 The record does not show that the merchant agent differs in this respect from the exclusive commission or joint agents who have been admitted to be Express Agency employees. Moreover, Rules 851-853 of the Express Agency's "General Rules and Instructions" specify that agents may, under certain conditions, accept checks from responsible business concerns and individuals.

f. As representatives of the Express Agency, merchant agents belong to no union.

The same is true with respect to the caretaker or custodian agents and the "other commission agents", all of whom are conceded to be Express Agency employees, and it may also be true with respect to those exclusive commission agents who are not subject to the Rules agreement h the Clerks, and whose positions are not subject to bid l are not placed upon a roster.

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[203] With regard to the deduction of expenses in order to ascertain an individual's creditable compensation, it may be noted that the Board's general counsel has held that an individual's gross compensation may, under certain circumstances, be used as his creditable compensation. Thus, in Opinion L-49-557, dated October 6, 1949, it was held that where the compensation reported for an individual is gross compensation rather than net compensation, and it later appears that some, perhaps the greater part, of the individual's expenses were attributable to his other business activities, and it is impossible to distribute the expenses accurately among his various business activities, the reported compensation may be used as the individual's creditable compensation.

The merchant agent chooses the place in the store, or other business establishment, where the express work is to be performed.

here is nothing in the record to show that the Express ency has any voice in determining where the express k is to be performed in the railroad station, yet it con- es, and the Supreme Court of the United States had ted, that joint railroad-express agents are employees of Express Agency with respect to their express work.

The merchant agent is not reimbursed for any expenses which he may incur in connection with advertising express service at his agency.

ule 899 of the "General Rules and Instructions" pro- es, in pertinent part, that "Agents are not permitted to ir any expenses for advertising." Aside from this, ever, it may be noted that there is nothing in the record how that the joint agents, for example, who are conceded e Express Agency employees, would be reimbursed for advertising expenses which they might incur.

If the merchant agent accepts counterfeit money in payment of express charges he must suffer the loss involved.

4 There is nothing in the record to show that the Express Agency would assume any loss arising from acceptance of counterfeit money by any of the various nts who are admitted employees of the Express Agency.

The Express Agency states that in some instances mer- hant agents obtained their express agencies by reason of having bought or inherited a merchant agent's busi- ess interests.

n support of this statement the Express Agency sub- ed questionnaires completed by seven individuals who either were or had been merchant agents (Exhibits LIII through LIX, 48R, 597-602). Examination of these questionnaires shows that five of the seven stated that they had been interviewed by, or had consulted with, Express Agency representatives before becoming express agents, and only two of them stated that they "consulted for the first time with a route agent or superintendent of Railway Express Agency" after they became agent. When representatives of the Express Agency were asked, during the 1948 hearings, whether it was customary for the Express Agency "to permit its business to be handled by someone as agent prior to any arrangement having been made with the individual", Mr. Victor, Auditor of Disbursements for the Agency, stated "I can't understand that. I am not familiar with the operations", and Mr. Long, the Express Agency's attorney, stated "I will concede it is not customary. It is customary to have a route agent talk to someone before such an arrangement is made. In this particular instance, it was made without that." (48R, 603.)

It is obvious, of course, that no express agent could, by merely selling his business interests to a third party, guarantee that such third party would automatically succeed him as express agent. On the other hand it is possible that there could have been some understanding between the agent and the Express Agency, or its representative, that when and if he should sell his business interests he would arrange with the purchaser to also perform the express work at the agency, on a temporary basis, pending the Express Agency's selection of a new agent.
3775 It must be noted, in this connection, that the Express Agency's Form 95 is used "for the transfer of accounts at each commission agency from one agent to another, whether the agency be operated by a joint agent, exclusive commission agent, or merchant agent." (48R, 10.) Until an express agent has been checked out and the

unts transferred from him to his successor, he is still
express agent and presumably responsible for the
ncy even though he may have sold his business inter-
and may have arranged for the purchaser of such
rests to temporarily perform the actual express work
he agency.

The Express Agency states that it has no voice in the
decorating (painting, etc.) of merchant express offices.

lthough the "General Rules and Instructions" (Rule
provide that express offices should at all times present
eat and attractive appearance, and that they must be
clean, they do not provide that the offices must be
rated or painted in any particular way. It is, of
se, reasonable to assume that if the Express Agency
s or leases the premises where the office is located, or
decorates the office at its own expense or furnishes the
t, paper, etc., used in decorating the office, it would
a voice in determining when and how the office should
ecorated. However, if the agent (irrespective of what
ay be called) pays for decorating the office, and par-
larly where the office is located on property owned
eased by the agent, it is also reasonable to assume that
Express Agency would not have anything to say re-
ding the decorating (painting, etc) of the office.[204] In
connection it may also be noted that the testimony in
1937, 1938, and 1948 proceedings does not indicate that

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4. As previously stated, the so-called merchant agents
generally engaged in other business activities, and
r express work is often performed in part at least, in
same place used for such other business activites. It
ld seem rather obvious therefore that the Express
ncy would not have any voice in determining how a re-
druggist, for example, would decorate (paint, paper,
his drug store simply because he also operated an
ess office in that store.

3776 the Express Agency has any voice in the decorating (painting, etc.) of railroad stations where joint railroad-express agents perform express work, yet, as previously pointed out, the Supreme Court has stated, and the Express Agency has conceded, that the joint agents are employees of the Express Agency in the performance of their express work.

1. The Express Agency states that it has no control over the personal conduct and appearance of merchant agents or the individuals assisting them in the performance of express work.

It must be remembered that the essential question involved in these proceedings is not whether the Express Agency has the right to tell the agent or his assistants how to dress, or how to cut their hair, or how to decorate the express office, etc., but whether it has the *right*, irrespective of whether that right is ever exercised, to supervise and direct the manner in which the express work itself is performed. Likewise, it must also be remembered that the mere fact that a particular rule is not enforced at an agency does not mean that the rule is not applicable, or that the Express Agency would not have the right to enforce the rule if it should decide to do so. It may only mean that, for reasons of its own, the Express Agency has chosen to waive enforcement of the rule at the particular agency. Aside from this, it should be noted, for example, that Rule 827 of the "General Rules and Instructions" merely provides that "The personal conduct and deportment of employes must be such as to reflect credit upon themselves and on the Company, and their personal appearance should be neat, clean and orderly. When on duty they should wear such uniform as may be required."[205] It should also be noted that the record of the 1938, and 1948 proceedings does not show that the Express Agency has any greater control over the personal conduct and appear- of the joint agents, caretaker or custodian agents, or other commission agents", who have been conceded employees than it has over the merchant agents who ms are independent contractors.

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[205] The record of the 1948 proceedings indicates some difference of opinion among Express Agency witnesses as

view of all the foregoing circumstances, I am of the on that the merchant agents are, with respect to their ss work, employees of the Express Agency within

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application of Rule 827. Route Agent McAdam, in r to a question by the Express Agency's attorney, ong, testified that the Rule was not applicable to mer- agencies. Agent Jordan, Fremont, Michigan, in r to a question by Mr. Long as to whether he con- d the Express Agency had the right to direct him as appearance of himself and those assisting him re- in the negative, and Agent Horton testified that he consider that the Express Agency had anything to th respect to the personal conduct of himself and assisting in performing express work at his agency. Mr. Long read this Rule to Agent Schreiber, Tell Indiana, and then asked him whether he considered anybody connected with the Express Agency may di- ou as to *what shall be worn by your employees or the r in which they comb their hair, etc?"* (Emphasis ed) he replied in the negative (48R, 170-171). How- when the Clerk's General Counsel, Mr. Crawford, read Rule 827 to agent Schreiber and asked him er he considered that this Rule would be applicable as agent he replied in the affirmative. Agent West- ewberry, Indiana, testified that the only thing those ng at his office were required to do was "to look neat, that this was much more important in the conduct drug business than in the conduct of the express ss (which is rather small at his agency), and that takes care of both." (48R, 20.) As previously d out, Mr. Hartung stated at the 1937 hearing that Rules explain themselves" (37R, 30), and Mr. Long ussing a particular rule (Rule 920) at the oral argu- on October 6, 1954, stated "The rule speaks for it- can't add to it." (480A, 11.)

e meaning of the Railroad Retirement and Railroad Un-
nployment Insurance Acts, except that no opinion is ex-
ressed with regard to the creditability of any pick-up and
elivery service performed by any merchant agent as a
art of a general drayage business.[206]

The Express Agency also contends that the individuals
ssisting the merchant agents in the performance of their
xpress work are employees of the merchant agents
ather than the Express Agency. In this connection
states that it does not always know the number or
lentity of the individuals assisting the agent at the vari-
us agencies; that it has no voice in hiring or disciplining
uch individuals or in fixing their salaries or hours of
ork; that it does not pay them for their work,[207]

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206. While it is very likely that any express pick up and
elivery service performed by a merchant agent as a part
f a general drayage business conducted by him would not
e creditable (*Roth* v. *Harrison*, C. C. H. Railroad Retire-
nent Reports 4125 C. N. D. elle. 21946, Civil No. 44-C-456),
he record contains no testimony on this point.

207. In the case of *Linstead* v. *Ches. & Ohio Ry.*, 276 U. S.
8 (1928), the Big Four Railway Company had lent to the
Chesapeake & Ohio Railway Company a locomotive and
rew which the latter railway company used for trans-
orting its own business. In holding this crew to be em-
loyees of the Chesapeake & Ohio Railway Company, the
Supreme Court stated, at page 34:

> "Now the work which was being done here by Linstead and his crew was the work of the Chesapeake & Ohio Railway. It was the transportation of cars, loaded and empty, on the Chesapeake & Ohio Railway between Stevens and Cincinnati. It was work for which the Chesapeake and Ohio road was paid according to the tariff approved by the Interstate Commerce Commission; it was work done under the rules adopted by the Chesapeake & Ohio Railway Company; and it was done under the immediate supervision and direction of the trainmaster in charge of the trains running from Stevens to Cincinnati, and that trainmaster was a superior employee of he Chesapeake & Ohio

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that it cannot discharge them.[208] In the 1938
eedings the Express Agency made the same

We do not think that the fact that the Big Four
paid the wages of Linstead and his crew or that
ould only be discharged or suspended by the Big
prevented their being the servants of the Chesa-
& Ohio Company for the performance of this
ular job." (Emphasis supplied.)

may be noted that the Board's General Counsel
l a number of opinions relating to the status
uals assisting various express agents. For ex-
Opinion L-40-480, 1940 U. I. 21, the General Coun-
n the status of three individuals who had assisted
press agents. One of these was a Mr. Charles
ho had assisted the Express Agency's exclusive
ehighton, Pennsylvania. The statement of facts
; Mr. Blair's work, set forth in the opinion, reads
s follows:

ne agent has supplied the following information:
red claimant and paid him out of his own com-
ons. The Express Agency did not adjust the
's compensation in order to allow for assistance,
ne Express Agency had no voice in determining
nount of claimant's pay or the manner in which
s to be paid. The agent never requested per-
on from the Express Agency to engage claimant
sistant. However, the volume of traffic at the
y was so great that the agent could not reasonably
been expected by the Express Agency to perform
ork himself; there was a 'general understanding'
custom prevalent in the particular territory
he agent was to have authority to hire assistants
ut first securing permission from the Express
y; and the Express Agency had knowledge of
cquiesced in claimant's hiring and performance
press work through its Superintendent who ex-
d monthly reports, and through the Route Agent
ther company officials who visited the agency at
r intervals and never raised any question as to
ant's rendering of express service. Although the
ss Agency's officials had the right to supervise
aimant in the performance of his express service,
ght was not exercised, and the agent himself
vised and directed claimant's service. The agent

contention with respect to the individuals assisting 3779 the joint agents. Thus, Superintendent Huff of the Express Agency, testifying in the 1938 hearings, stated at pages 26-27:

> "We make an arrangement with one person to look after the business, not necessarily to perform it all himself, but our contract is with him and we hold him responsible for the results. As a matter of fact, it is common for the agent to be assisted by people in his service or by members of his family, though whether the agent is a so-called merchant agent or joint railroad express agent, these agents are not employees of the Express Company but have contracted to do the work and are free to do it in such manner as they choose, whether by performing the work themselves or by delegating others to do it. The express company does not exercise any supervision over choice of who performs the work. It does not concern the Railway Express Agency. The Railway Express Agency chooses to have the work handled by contract rather

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instructed claimant to follow the Express Agency's 'General Rules and Instructions.' Claimant was subject to discharge by the Express Agency, but such action would be through the agent. The agent personally provided for payment of premiums under the State Workmen's Compensation Act, and from claimant's salary he deducted the tax required under the Carriers Taxing Act.

"Information submitted by the Division Superintendent of the Express Agency, Mr. J. P. Downey, is consistent with the above, except for his statement that none of the officers of the Express Agency reserved the right to supervise or direct claimant in the performance of his service.

"Mr. Lutz, Vice-President of the Express Agency states that the agent had the power to hire, fire, and discipline claimant, and, therefore, that claimant 'is one of those individuals Railway Express Agency, Incorporated, contends is not an employee within the meaning of the Railroad Retirement Acts and the Carriers Taxing Act of 1937 and for whom a record of compensation has not been reported to the Board'."

> than by employees. Our business moves at all hours of the day and night. The arrival and departure of the trains may not be during the business hours of the merchant or regular working hours of the railroad agent, but the agent must see that shipments are handled promptly. The Railway Express Agency does not require him and it has never been the practice of the Express Agency to require that the agent handle the business himself. He is free to enlist such assistance as he may need, to substitute''.[209]

As previously pointed out, the United States Supreme Court has stated, and the Express Agency has conceded, that the joint agents are employees of the Express Agency with respect to their express work. Similarly, the Express Agency has also conceded that the individuals regularly assisting the joint agent in performing express work at the station are employees of the Express Agency in the performance of their express work.

In support of its contention that the individuals assisting merchant agents are not its employees, the Ex-
3780 press Agency points to Agent Burns at Sparta, Illinois, and states, at page 65 of its main brief, "'Imagine the trouble and expense Merchant Agent Burns with his eighteen employes and daughter and son would be required to endure in meticulously accounting for the time each spend on express work, if in fact they were employees of Express Agency with respect to such work.' "[210]

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[209] It appears that exclusive commission agents may also have some freedom of action in selecting their assistants. See Footnote No. 142, and also Wage and Hour Division Opinion Letter by Charles H. Livengood, Jr., Chief of Wage-Hour Section, June 5, 1942, referred to in C. C. H. Labor Law Reports, 4th Edition, P. 25, 126.62.

[210] At the 1948 hearings Agent Burns testified that it took from seven to eight working hours a day to handle express at the Sparta agency, including the two to three hours a day which he devoted to express work. In addition to serving as express agent at Sparta, Mr. Burns also operated a feed and grocery business there under the

There is no statutory requirement in either the Railroad Retirement Act or the Railroad Unemployment Insurance Act that the particular duties of an individual's employment must in all respects be carried out by the individual rather than delegated to another. The essential question in each case must be who is the individual subject to the employer's authority to supervise and direct the manner of rendition of his service, which service he renders for compensation. Thus, in an early opinion (L-39-35, 1939 R. R. 10) the Board's general counsel stated:

"For example, if the employer continues to hold the

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name of the Burns Wholesale Grocery Company, and the express office was located in the same building as the Wholesale Grocery Company. With regard to the assistance which he had in performing the express work, Mr. Burns stated that his daughter performed most of the paper work at the agency; that his son performed some express work; that in addition to his son and daughter and any other of the five employees working on the main floor of the Wholesale Grocery Company might take care of any express shipments that were brought in, and that any of his eighteen employees might take the express over to the depot and put it on the train. He added that one individual in particular assisted him in the pickup and delivery work and also met certain trains. This individual was later identified as Mr. Earl Mulholland, and Agent Burns stated that Mr. Mulholland also assisted him in handling express in the office. When Mr. Burns was asked who was taking care of the express business at the agency while he was attending the 1948 hearings, he replied that either the son or daughter was taking care of it. In his reports to the Express Agency agent Burns did not show any compensation paid to the individuals who assisted him in performing the express work. He stated that he had not done this because he was the agent. While agent Burns did not pay any taxes under the Railroad Retirement Tax Act, or contributions under the Railroad Unemployment Insurance Act, on the basis of any portion of the wages which he paid to his assistants, including his son and daughter, he did pay social security taxes on their entire wages. Mr. Burns resigned as express agent at Sparta in November 1948, and was checked out as agent on December 14, 1948.

> individual responsible for the discharge of the duties of his position, and, in consideration of the discharge of the duties of that position, pays money remuneration to the individual, it is immaterial that the individual has delegated the actual carrying out of some or all of the duties to another, or that he may have, in turn, paid over to that other a part or the whole of the compensation paid to him. On the other hand, it is conceivable that an employer may have knowledge of the inability of an employee to carry out the
> 3781 duties of his position and of the turning over of the duties to another, whose services the employer thereupon accepts, and with respect to whom the employer thereupon exercises his authority to supervise ~~and~~ direct the manner of rendition of the services. In such case, the second individual may become an employee (if he receives compensation), even though the name of the former employee is retained on the payroll and compensation paid through him. The determination of the identity of the employee within these principles is a question of fact to be decided in each case by those agencies of the Board having jurisdiction over such determinations."

As previously pointed out in the discussion relating to the status of merchant agents, the Courts have often held that individuals who engage other individuals to perform or to assist them in performing their work are, nevertheless, employees. *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52 (W. D. Mo. 1946); *Tomlin* v. *United States*, 70 F. Supp. 677 (N. D. Calif., 1946); and *Adams Express Co.* v. *Schofield*, 111 Ky. 832, 64 S. W. 903 (1901). This relationship of master and servant may be express or implied, and it is not essential that the name of the servant be on the pay roll of the master. *Jones* v. *Goodson*, 121 F. (2d) 176 (C. A. 10, 1941).[211] Even when no actual
3782 permission to engage an assistant is given an employee by the employer, or where there is no showing

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[211] The designation of an individual as other than an employee is not controlling (20 C. F. R. 203.6). Similarly,

that the employer had actual knowledge of and consented to the employing of an assistant, the facts may still warrant the conclusion that the employer had impliedly granted permission to engage an assistant or that the employer had implied knowledge thereof and had impliedly consented thereto. *Haluptzok* v. *Great Northern Ry. Co.*, 57 N. W. 144 (Minn., 1893); *Monetti* v. *Standard Oil Co.*, 195 So. 89 (La. 1940).[212]

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the fact that the Express Agency, or the agents, may consider the agent's assistants to be employees of the agent, or may refer to them as such, is not determinative of their status under our Acts. As the Court said in *Walling* v. *McKay*, 70 F. Supp. 160 (D. Nebr., 1946) (affirmed in *McComb* v. *McKay*, 164 F. (2d) 40 (C. A. 8, 1947) at page 174:

> "A sufficient answer to plaintiff's argument referring to portions of the evidence wherein both the defendants and their counsel have referred to the workmen as employees of the defendants is found in *Walling* v. *Western Weighing & Inspection Bureau*, 7 Cir., 160 F. (2d) 47, wherein the court said: 'True, the involved employees are in numerous instances referred to and designated as those of the defendants; in fact, they are so designated on books and records kept by the defendant. But because they are referred to as such does not alter the basic fact that they are employees of the railroads. We apprehend it is not an uncommon thing for employees of a large industrial or mercantile business to be referred to as those of some department or subdivision thereof and to be carried on the books as such. There at once comes to mind the situation in our own court. The personnel of the court and of the individual Judges are commonly referred to as employees of the court or of the Judge. In the clerk's office the employees are referred to as those of the clerk and carried on the records in that office as such. This situation, however, would constitute no proof that they are employees of the United States Government."

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[212] A rather detailed discussion of express and implied consent, in the case of express agents hiring other individuals to assist them in performing express work, can be

As stated in the early opinion of the Board's General Counsel (L-39-35), referred to above, the determination of the identity of the employee within the principles set forth therein as a question of fact to be decided in each case by those agencies of the Board having jurisdiction over such determinations. In this connection it must be noted that there is nothing in the Railroad Retirement Act or
3783 the Railroad Unemployment Insurance Act, literally,
or their legislative history, to indicate that their coverage is to be determined by the expense of difficulty or administration involved, by the smallness of the tax payable, or by the preference of the persons covered. Consequently, if it should be determined, in a given case, that the Express Agency has expressly or impliedly consented to, or authorized, the performance of some portion of the agent's duties by other individuals, and the service of such other individuals, even though casual or intermittent, can be identified, the service, and the compensation attributable

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found in an opinion of the Board's General Counsel, L-40-108, 1940 R. R. 11, dated March 8, 1940. In this connection it may be noted that although the record does not indicate that the Express Agency ever expressly authorized Mr. Burns to hire any assistants to perform express work, the evidence indicates that the Express Agency knew, or could reasonably have been expected to know, that Mr. Burns could not perform all of the express work himself. For example, since Mr. Burns' private office was on the second floor, just off the main office, and the express office was on the first floor, the Express Agency knew, or should have known, that he was not performing all of the express work himself. That this is so is also shown by Mr. Burns' testimony that if the Express Agency's route agent came into the express office on the first floor his daughter would notify him that the route agent was there. Furthermore, since Mr. Burns himself performed part of the express pickup and delivery work with his truck it is obvious that someone else must have been performing the express work at the agency while he was operating the pickup and delivery truck.

thereto, may be credited under the Acts.[213] However, if
the individual's service is of such a negligible or trifling
nature that it cannot be identified as to extent or time, it
would likewise be impossible to identify any portion of the
individual's total compensation as being attributable
3784 to the express service.[214] Such service would there-
fore not be creditable as compensated service under
our Acts.[215]

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213. Except in cases where the express pick-up and delivery service at the merchant agency is performed as a part of a general drayage business, the individuals who perform express pick-up and delivery service, in vehicles owned by the merchant agent, and who also perform employee service for the Express Agency or a railroad in addition to such pick-up and delivery service, are employees, but no opinion is expressed as to the status of individuals who perform no railroad or express work in addition to the pick-up and delivery work. Similarly, no opinion is expressed with respect to the status of individuals who perform express pick-up and delivery work in their own trucks under an agreement with the Express Agency or the agent, as the case may be.

214. Cf. *Prescription House* v. *Anderson*, 42 F. Supp. 874 (S. D. Texas, 1941).

215. For example, casual or intermittent express service by one of Burns' eighteen employees, being a purely limited, mechanical service incident to the individual's regular service for the Burns Wholesale Grocery Company, could well be of such negligible or trifling nature that it could not be identified as to its extent, or the actual working time, involved, and it would therefore be impossible to identify any portion of the individual's total compensation as being attributable to the Express service. As indicated above, such casual or intermittent service would therefore not be creditable as compensated service under our Acts. In this connection it may be noted that in Jurisdictional Docket No. 2, Examiner Schoene, in discussing the deductions which would have to be made in order to determine an agent's net compensation, said in his Second Report, at page 32:

> "* * * no deduction is to be made on account of services performed gratuitously by relatives or friends

(5) Other commission agents and their assistants.

As previously pointed out, certain express commission gents not coming exactly within any of the preceding roups have, for the purposes of this report, sometimes een referred to as "other commission agents". Included n this group are (1) individuals engaged in railroad work ther than station agent, caretaker or custodian service. ho perform their express work on premises under raiload work or express agency control; (2) individuals not ngaged in railroad work who perform express work on ailroad premises under an agreement between the Exress Agency and the railroad, and (3) individuals who onduct their express business, and perhaps engage in ther business activities, on premises for which the Exress Agency pays rent to a third party. There is little any difference between the "other commission agents" nd the so-called merchant agents, except that the merhant agents perform their express work on premises not nder railroad or Express Agency control through ownerhip, lease or some other arrangement. A good example f this group is agent Harrison, Rockville, Indiana. Like ost of the so-called merchant agents Harrison is engaged n other business activities (railroad pick up and delivery nd transfer work and a general transfer business), and xcept for the facts that the Express Agency pays rent a third party for the premises used by him as an ex-

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of the agent, because in such cases it is clear that all of the express commissions represent compensation for the agent's personal services. Such cases are no different from the case of an exclusive *commission agent*, or other *admitted employee*, who happens to have a relative or friend gratuitously assist him in rendering his service for the employer. Nor is any deduction to be made on account of persons in the agent's general employ who happen to do some work for the agent in connection with the agent's express service."

press and transfer office, and also pays for the telephone in the office, the situation with respect to Mr. Harrison's relationship with the Express Agency does not appear to differ from the situation with respect to the so-called merchant agents' relationship with the Express Agency. As previously mentioned, the Express Agency concedes that the individuals referred to in this report as "other commission agents" are its employees.

3. Fixed Allowance Agents.

For the purposes of this report the term "fixed allowance agents" is applied to all individuals in charge of agencies (other than salaried agents) who devote some or all of their working time to express work and who are paid therefor on the basis of a fixed allowance or stipulated sum per month. Included in this general classification are the individuals sometimes referred to as contract agents, and those other express agents, sometimes referred to as exclusive commission agents, joint railroad-express agents, caretaker or custodian agents and merchant agents, who are paid a fixed allowance or stipulated amount per month instead of a commission. The Express Agency concedes that except for those who perform their express work on premises not under express or railroad control through ownership, lease or some other arrangement, the individuals referred to in this report as fixed allowance agents are its employees.

As previously stated, mere ownership or control of the premises where the work is performed is not determinative of an individual's status under our Acts. The fixed allowance agents who perform their express work on premises not under Express Agency or railroad control, differ from the commission agents who perform their express work on premises not under Express Agency or railroad con-

ol only in that they are paid a fixed allowance or stipu-
ted sum per month instead of a commission. Conse-
uently, it is clear that what was said above with regard
the employee status of these commission agents is equally
pplicable to the fixed allowance agents,[216] and that they,
e the commission agents, are therefore employees of the
xpress Agency within the meaning of the Railroad Re-
rement and Railroad Unemployment Insurance Acts.

4. Limited Agents.[217]

For the purposes of this report the term "limited agents"
cludes individuals, hotels, YMCA's, warehouses, retail
ories and the like who act as agent for the Express Agen-
in performing a part or all of the following work in
nnection with express business: (a) receipt for express
baggage transfer shipments (both prepaid and collect
ipments) on their premises, which shipments are picked
by the express driver; (b) permit undelivered express
ipments to be held at their premises for call by the con-
gnee; (c) receive calls, usually by telephone, requesting
at a driver of the Express Agency pick up a shipment at
designated address, and transmit such calls to either an
press driver or agent, and (d) influence students and
ners to use express service in the transportation of their
ggage and laundry. These agents are usually paid on the

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[216] Similarly, the previous discussion regarding the
tus of the individuals assisting the various commission
ents would be equally applicable to individuals assisting
various fixed allowance agent.

[217] At the 1948 hearing these agents were generally re-
rred to as "branch agents". It developed, however, that
Express Agency has branch agents who are full time
aried employees, and branch agents who are railroad
ployees paid on a commission basis for their express
rk. The Express Agency conceded that these indivi-
als were employees, and in order to distinguish its em-
yee branch agents from those it contended were inde-
ndent contractors, it decided in its brief to refer to the
ter as "limited agents".

basis of a specified amount per call or shipments but are in
a few instances paid a commission or a stated sum per
3787 month. They have sometimes been referred to in ex-
press circles as branch package receiving agents,
branch agents sub agents,[218] influencing agents,[219] campus
representatives,[220] and call agents.[221] Limited agencies, as

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218 As used in express circles the term "sub agent" has been applied to joint agents, to the salaried individuals in charge of the metropolitan branch agencies, and as another designation for the branch agents (limited agents) mentioned above.

219 At the 1948 hearings, the Express Agency's General Auditor of Disbursements, Mr. Victor, testified that:

> "The term 'influencing agent' is one oftentimes applied to a representative similar to the branch package receiving agent. These influencing agents are hotels or employees of hotels or students at institutions of learning, who actually arrange to have the baggage and other shipments of students or hotel guests forwarded in express service or transferred in a baggage transfer service operated by the Express Agency in the particular locality. An example of such influencing agent is John Kelley, superintendent of service, Hotel Gibson, Cincinnati, Ohio." (48R. 395)

Similarly, General Auditor Gross testified that influencing agents

> "* * * were in the same category as the branch agents and the same is true of the so-called campus agents. They are merely a facility for the convenience of the many people who may have been living or quartered at the institution, to give them the opportunity of having some place to leave their packages and to have them called for later by the express driver." (48R. 539)

220 These individuals have also sometimes been referred to as "influencing agents". They are generally students selected on the recommendation of a member of the school faculty, but may also be an employee of the school. They may be distinguished from other limited agents in that they also solicit business for the Express Agency. In addition to soliciting express business they distribute folders, advertising express service, and express labels and tags.

221 This term has been applied by some express offi-

h are not listed in the Express Agency's Official Direc- of Express Offices, and the Express Agency does not sider such agencies (or sub-agencies) to be express es.

As previously mentioned, the Express Agency has 8 some "branch agents" who are full time salaried employees,[222] and some who are railroad employees paid

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s to representatives who receive at their place of busi- s packages for express transportation, and who, when have such packages on hand, hang an express call card ign where a passing express driver will see it and stop pick up the shipment.

22 In the 1948 hearing, General Auditor Gross of the ress Agency stated:

> "I am trying to explain now the references that have been made to branch agents in all categories. In the larger cities, which comprise our salaried offices, we establish city offices and branch offices, all of which are conducted by exclusively employed express employees paid on a salaried basis. We have, for example, in New York, numerous branch offices of that kind which are in charge of an agent. They have salaried employees at all of these exclusive branch agencies. The agent does not carry the title of branch agent. He is the agent at the branch office, but frequently has been referred to as a branch agent. Those agents or those branch offices are situated generally in the more densely populated areas or industrial areas where there is a substantial amount of business to be conducted. In the outlying residential districts, in years gone by, for many years, during at least the forty-seven years that I have been in the express service, in residential areas, in order to accommodate the patrons so that they may be able to forward their express shipments without waiting for a vehicle man to come to call for their shipments, we established in merchants' stores, drug stores and other facilities, other stores that were open a substantial part of the day, so-called branch agencies or branch agents. They are not exclusively employed by the express company. They are not salaried employes. *They are in fact not*

n a commission basis. These individuals are all conceded o be employees. Aside from this, however, the term branch agent'', as used in express circles, has had both a road and a restricted application. In its broadest sense the erm ''branch agent'', ''has been applied to all of those repesentatives or agents who perform service in receiving or elivering express shipments at or from their place of usiness, and who have less to do with express work than merchant agent.'' (48R, 394.) In its more restricted ense the term has been used to differentiate between a merhant, who is the official representative of the Express gency in his community, and a ''branch package receivng agent'' who conducts an independent trade or business f his own in the community and on the side receives calls or an Express Agency driver to pickup express shipments, and also accepts shipments from patrons in the locality
789 of his place of business for transportation by the Express Agency.[223] At the 1948 hearings the Express gency's attorney stated that there were also a few cases n which ''branch agents'' also received shipments from the xpress Agency's driver, when he is unable to effect their elivery, and hold them at their place of business for call y the consignee.

As the Express Agency stated at the 1948 hearings, the

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agents, agencies, in the manner in which we generally refer to the agencies. It is not a separate office.'' (Emphasis supplied (48R, 537-538.)

[223] At the 1948 hearings, the Express Agency's Audior of Disbursements, Mr. Victor, testified that:

> ''The 'branch package receiving agent' receives from shippers packages delivered to him for transportation and express service. Such packages are called for by a regular express driver and picked up from the branch package-receiving agent's place of business. These branch package receiving agents generally are hotels, YMCA's, schools, warehouses, retail stores and other similar places'' (48R, 394-395.)

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former general counsel ruled in 1942 (L-42-298)
anch agents" are not "employees" of the Express
That case involved three specific branch agents,
Cook, Hargraves, and Wood. In his opinion the
counsel stated:

The three individuals are 'branch agents', ren-
ng only limited service to the Express Agency:
k, in his printing establishment, receives telephone
s for the Agency and permits the Agency's unde-
red shipments to be held on his premises; Har-
es and Wood receive calls and issue receipts for
ess shipments in their own stores, and Hargraves,
ddition, delivers on-hand matter for the Agency.
individuals devote only a very small portion of
r time to service for the Agency and receive only
nall portion of their income therefrom.

The Agency's 'branch agents' differ in the follow-
respects from 'merchant agents' who, by Board
er of August 1, 1931 [1939] (B. O. No. 39-502),
held to be 'employees of the Railway Express
ncy: Unlike merchant agents, branch agents are
official representatives of the Agency in their com-
ities; they merely receive calls for the drivers of
Agency and accept shipments for transportation
he Agency. Branch Agents are located within
pick-up and delivery limits of a regular salaried
t (who is located in the same or an adjacent town)
reas merchant agents are required to perform or
nge for their own pick-up and delivery service.
ke merchant agents, branch agents are not re-
ed to render monthly balance sheets to the Agency's
rict Accountant or monthly reports of express
ations to the Agency's Superintendent, their only
gation being to account to the agent or general
t for funds received on express shipments for the
ncy; branch agents are not required to sign the
ncy's 'Application for Employment' forms or
lway Express Agency Forms 95'; they are not
n sets of the Agency's 'Rules and Regulations' to

follow in the performance of their work; and no cir-
3790 cular letters are sent to them from time to time by
the Agency with respect to their work."

There are many differences between the commission agents and the limited agents, insofar as their relationship with the Express Agency is concerned. This is illustrated by the following graphic outline of the principal differences between merchant agents and limited agents:

	Merchant Agent	Limited Agent
agent an official repre- ntative of the Express gency in his community?	Yes	No
the agency an express fice, and listed as such in e Express Agency's Official rectory of Express Offices?	Yes	No
it customary for the agent sign an application for ployment, or a written ntract, at the time he ters the service of the Ex- ess Agency?	The merchant agent generally signs the Express Agency's form No. 100, "Application for Employment".	With the exception of the individuals sometimes referred to as campus representatives who are apparently engaged under verbal agreement, it is generally customary for limited (branch) agents to enter into a uniform written contract with the Epress Agency.[224]
what basis is the agent mpensated for the express rk performed at the ency?	On a commission or commission-plus basis.	Usually on the basis of a specified amount per call or shipment, but in a few instances on a commission or a stated sum per month basis.
w is the agent paid?	He deducts his commission from the express charges collected at the agency.	In cash by the local salaried agent if the amount due is less than $3.00. If over $3.00 he is paid by a check from the Express Agency.
w does agent remit funds the Express Agency?	Generally the agent places the money in a remittance envelope, addresses it to the Assistant Treasurers, and obtains a receipt from the messenger or trucker, who serves his office. In a few instances he is permitted to send the remittance by U. S. mail.	Except in the case of campus representatives who do not handle money, the limited agents hold any charges collected until the driver picks up the shipment. At that time the driver signs a receipt book and takes the shipment, and the charges collected, with him.

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[224] The Express Agency states that the limited (branch agents do not sign an "Application for Employment." (Express Agency's main brief, page 62.)

		Merchant Agent	Limited Agent
7.	Does the agent have an account with the Express Agency's Accounting Department or district accountant?	Yes	No
8.	Is the agent furnished with a copy of the Express Agency's "General Rules and *Instructions*"?	Generally yes.	Generally no, but in a few instances have been given a copy at their request.
9.	Is the agency required to make regular mnothly reports to the Express Agency?	Yes	No
10.	What items of equipment or supplies are furnished to the agent by the Express Agency?	The items furnished vary somewhat from agency to agency, but may include, in addition to the many forms and tariffs, such items as scales; platform trucks; desk; safe; chest of drawers; metal stamp; chair; revolver; stationary cabinets, tarpaulins.	Waybills and address stickers, a rate book; collect and prepaid receipts; pot of glue, and in a few instances a scale or hand truck.
11.	What Express Agency office has jurisdiction over the agent?	Division Superintendent (Rule 789 of the "General Rules and Instructions") and Route Agent (now called division supervisor).[225]	Local salaried agent
12.	Has the Express Agency listed an individual, or some other entity as its agent in the Exhibits filed in the 1948 proceedings?	Individual listed.	In some cases business entities other than individuals have been listed.

3791 The differences between the limited agent and the
merchant agent may also be illustrated by a comparison of the nature and complexity of the work performed at
such agencies. For example, merchant agent Horton testified that the work at his agency consisted of pick-up
3792 and delivery work; the receipt and delivery of express
shipments, including valuable shipments; the collection of transportation charges, including C. O. D. charges; making our various reports to the Express Agency; remitting funds to the Express Agency, and issuing for shipments. Merchant agent Schrieber testified that the express work at his agency consisted of selling money orders; handling express shipments, including C. O. D. shipments, and

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[225] Rule 789 also states that the Route Agent (now called division supervisor) is the personal representative of the Division Superindentent.

valuable shipments; maintaining a "call book" for the use of the pickup and deliveryman; collecting charges; making daily cash remittances to the Express Agency; maintaining a register of shipments; making out claim papers whenever necessary; making regular reports to the Express Agency. Merchant agent Burns testified that the express work at his agency consisted of selling financial paper; making weekly and monthly reports to the Express Agency; making out prepaid waybills on prepaid shipments; collecting charges; pickup and delivery work; meeting trains, and receiving express shipments. Limited agents, on the other hand, merely perform a part or all of the following express work: (a) receipt for express or baggage transfer shipments on their premises which shipments are picked up by an express driver; (b) permit undelivered shipments to be held on the premises for call by the consignee; (c) receive calls, usually by telephone, requesting that a driver of the Express Agency pick up a shipment at a designated address, and transmit the calls to either an express driver or agent, and (d) influence students and others to use express service in the transportation of their baggage and laundry.[226] In the performance of this work the limited agents accept both prepaid and collect shipments.

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[226] For example, in sharp contrast to the work performed at the three merchant agencies referred to above, Mr. D. V. Thorne, Resident Manager of the Lawson Y. M. C. A., Chicago, Illinois, testified that at the Y. M. C. A. branch agency (a limited agency) the express work consisted only of accepting collect shipments from the residents of the Y. M. C. A., and in making out the necessary waybills, and Mr. John Kelly, superintendent of service and transportation at the Gibson Hotel, Cincinnati, Ohio (a limited agency) described the express work performed at the hotel in the following words:

> "Well, when a guest has a truck or baggage he wants to send to the depot, why, we issue him a check, and one portion of the check goes on the baggage, and the other check is issued to the guest." (48R, 333)

It is apparent from the foregoing discussion that limited
agents, unlike the merchant agents, are not subject to the
continuing authority of the Express Agency to super-
3793 vise and direct the manner of rendition of their ex-
press service. They merely perform a purely limited,
mechanical service, and are in no way obligated to take
orders from the Express Agency as to the manner of per-
forming this service. It follows that in performing such
service they are not employees of the Express Agency with-
in the meaning of the Railroad Retirement and Railroad
Unemployment Insurance Acts.[227]

Mr. Kelly also collects charges for hauling express baggage shipments from the hotel to the depot, and turns such funds over to an Express Agency collector who comes around once a week. When Mr. Kelly, or his assistants, are in doubt as to the exact charge for hauling a particular shipment they call the Express Agency's office, and they also call the express office when they have some express shipments to be picked up at the hotel.

[227] *Cf. Shiman Bros. & Co.* v. *Nebraska Nat. Hotel Co.*, 9 N. W. (2d) 807 (Nebraska, 1943). A salesman for Shiman Bros. (a wholesale jewelry firm) had been staying at the Paxton Hotel, Omaha, Nebraska. He telephoned the porter's desk in the hotel to send some one for his trunk. A uniformed hotel porter went to his room and gave him a baggage check of the Express Agency for transportation of the trunk from the hotel to the Union Station. The porter took the trunk to the first floor and left it on the loading dock ungarded while waiting for an Express Agency truck to call for it. While it was on the loading dock the trunk was stolen, and the jewelry company sued the hotel company, which owned the Paxton Hotel, and the Express Agency. With respect to the Express Agency, the Court said at page 812 that "It [the trunk] never came into the possession of an employee of the Express Agency", and, at page 813, that:

> "There is no evidence in the record of the existence of any agency relationship between the hotel or any of its employees and the express company, except for any inferences that might be drawn by the use of the baggage check. There is no evidence that the defend-

3794 Part V. Other Express Workers.

In its original demand for the refund of contributions dated November 20, 1943, the Express Agency included a group referred to as "All Others". In referring to this group in the demand for refund the Express Agency stated (Exhibit VI, at page 10):

> "These are individuals who have contracted for a stated sum to perform a stipulated service such as the meeting of designated trains at a particular station, the transfer of express shipments from train to train at a designated station, the cleaning of designated offices, and other services where no supervision of the manner of the rendition of the services is required or maintained. When the contract for such services is made, the results required are detailed, and the individual is obligated to produce such results. If the results are not in accordance with the specifications, the agreement for services comes to an end, but there is no supervision of the manner of the performance of such services as required by the Act to constitute such individuals employees."

This group was not included in the Express Agency's demand for refund dated May 17, 1947 (Exhibit No. VII), and when the Express Agency's attorney was asked to state the Express Agency's position regarding this group, he replied, at pages 285-286 of the 1948 hearings:

> "The term [All others] was used with reference to

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ant express company exercised any control or direction over the hotel porter, or that it paid him any compensation for his services. All of the elements of an agency relationship are absent and the evidence is consistent with the express company's claim that the hotel porter was employed solely by the Paxton Hotel."

According to Exhibit XLVIII 'Branch Package Receiving Agents for the period January 1, 1937 to December 31, 1948", the Paxton Hotel was a branch package receiving agent (limited agent) of the Express Agency during most of this period, and apparently was such an agency in July 1939, when the trunk involved in the above-mentioned case was stolen.

> a number of individuals included in our claim for refund. Such individuals were janitors and did casual work for a few hours a day. The question was whether or not they were independent contractors, or employees. They were doing work that ordinary employees do, they were not businessmen, and for that reason we decided to forget about them. Now that is the sum and substance of it. They were not merchants, they were not businessmen, they were not in that class, and because they were not in that class, because they were generally people who were working for a living, we decided to eliminate them."

nd at page 286:

> "Some of these 'all others' were men who were employed to transfer freight at a transfer point from one train to another. They were working people, and we decided to eliminate them from the claim."

ıd again at p. 327:

> "They include janitor service, station transfer service, the meeting of trains, and other incidental work. They include policemen and individuals having regular gainful employment in a broad variety of businesses. They are paid directly by Railway Express Agency."

though the Express Agency's attorney originally stated that the Express Agency was in substance admitting,
95 for the purposes of the hearing in the Jurisdictional Docket, that the individuals described as "all others"
re "employees" of the Express Agency, he later stated
t although the Express Agency was waiving its claim
h respect to them, it was not conceding that all of them
re employees.

t is clear from the record that, as the Express Agency's
orney stated in the 1948 hearings (48R. 327) "It would
impracticable for the purposes of this hearing to define
h category within" the "All others" group. In view
this, and since these individuals have not been, and

perhaps never can all be, identified, and the Express Agency has waived its claim with respect to them, the Examiner makes no finding or recommendation with respect to the status, under our Acts, of the individuals in the group designated in the demand for refund, dated November 20, 1943 (Exhibit VI), as "all others".[228]

Respectfully Submitted,

Omer M. Funk,

Examiner.

3802

RAILROAD RETIREMENT BOARD.

In the Matter of the Status, Under the Railroad Retirement and Railroad Unemployment Insurance Acts, of Joint Agents, Merchant Agents, Branch Agents and Certain Other Individuals Performing Express Work, and the Demand of Railway Express Agency, Incorporated, for Refund of Contributions Based on Compensation of Such Individuals.	Jurisdictional Docket No. 2-2A.

EXCEPTIONS OF RAILWAY EXPRESS AGENCY, INCORPORATED TO FINDINGS OF FACT AND CONCLUSIONS OF LAW RECOMMENDED BY EXAMINER OMER M. FUNK AND REQUEST FOR ORAL ARGUMENT THEREON.

Preliminary.

It may fairly be said that Railroad Retirement Board ler of June 23, 1948 (B. O. 48-229), quoted in part at ge 6 of the Examiner's report, resulted from:

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[228] Although the Examiner makes no finding or recommendation regarding the individuals in the group referred to as "all others", it may be noted that the services involved, appear to have been, for the most part at least, unskilled labor of such simple nature as to require no control other than of a routine nature. Such services are of a type generally found to be employee service rather than independent contractor service. *Cf. Hargis* v. *Wabash Railroad Co.*, 163 F. (2d) 608 (C. A. 7, 1947).

> (a) The formal demand made by Railway Express Agency, Incorporated* for refund of contributions based upon the compensation of—
>
> "1. Merchant Agents and their assistants
>
> 2. Joint Railroad-Express agents and their assistants
>
> 3. Branch Agents
>
> 4. All Others" (Exhibits VI and VII 48 R 22.)

and

> (b) Express Agency's reluctant willingness to concede for the purpose of this proceeding that joint agents are employees of Express Agency.

the purpose of emphasis and that the scope of B. O. 229 be fully understood at the outset, let us again eat that part of the said order quoted by the Examiner page 6 of his report:

3 > "(a) Are *joint agents, merchant agents, branch agents*, and *certain other individuals performing express work*, to be classified as employees under the Railroad Unemployment Insurance Act, and is the Railway Express Agency, Incorporated, entitled to a refund of contributions, under the Act, based on the compensation of such individuals?

In accordance with the usage in Examiner Funk's ort in Docket No. 2-2A:

> Railway Express Agency, Incorporated will sometimes be referred to as "Express Agency."
>
> The Order of Railroad Telegraphers will sometimes be referred to as the "Telegraphers."
>
> The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees will sometimes be referred to as the "Clerks."

ith appropriate page numbers, the record of the 1937 ing will be referred to as 37 R, the record of the 1938 ring as 38 R, and the record of hearings beginning in and ending 1950 as 48 R.

he Examiners' reports with appropriate page numbers be referred to by the name of the Examiner, such as nk's," "Schoene's first," or "Schoene's second."

> "(b) Are *joint agents, merchant agents, branch agents,* and *certain other individuals performing express work,* to be classified as employees under the Railroad Retirement Acts of 1935 and 1937?" (Emphasis supplied.)

Thus, under the Board's order, the Examiner was directed to consider four classes of representatives of Express Agency, namely:

(1) Joint Agents
(2) Merchant Agents
(3) Branch Agents
(4) Certain other individuals performing express work.

In his opening statement at the first hearing held August 10, 1948 in Jurisdictional Docket No. 2-2A, counsel for Express Agency defined joint agents as follows and withdrew claim as to them (48 R 8):

> "Joint agents are employed full time by a railroad as agent and while so employed also represent Railway Express as agent. They include all individuals within the scope rule of any agreements between Railway Express and the Order of Railroad Telegraphers."

This definition was clarified in the record, 48 R 580, as follows:

> "Individuals who are regular full time railroad agents and who concurrently with their railroad duties act as agents for Express Agency. Railroad and express work are performed on premises furnished by the railroad. They are paid by the railroad for their railroad work and by Express Agency for their express work. For their express work they are paid a commission or stipulated sum per month. These are called 'joint railway-express agents'."

Express Agency waived its claim as to "all others" who were defined in its formal claim as follows:

> "These are individuals who have contracted for a stated sum to perform a stipulated service such as the meeting of designated trains at a particular station,

the transfer of express shipments from train to train at a designated station, the cleaning of designated offices, and other services where no supervision of the manner of the rendition of the services is required or maintained. When the contract for such services is made, the results required are detailed, and the individual is obligated to produce such results. If the results are not in accordance with the specifications, the agreement for services comes to an end, but there is no supervision of the manner of the performance of such services as required by the Act to constitute such individuals employes."

)4 The Examiner recommends that branch agents (called limited agents by the Examiner in his report accordance with suggestion made by counsel for Express ency at page 43 of his main brief) be considered as not ployes under the Acts. See Finding of Fact 43 and nclusion of Law 2 (Examiner's Report pp. 29, 30).

Accordingly, the controversy between Express Agency l the Examiner is solely with respect to the status under Acts of the remaining class of agents in B. O. 48-229, wit, merchant agents, and to the status of their assist- s and employes.

n order to properly present its case, it was necessary t merchant agents be clearly defined. Express Agency leavored to do this at the outset of the hearings in risdictional Docket No. 2-2A (48 R 9, 10, 11, 12). This nition was refined somewhat at pages 322, 323, and at Examiner's suggestion (48 R. 324), at pages 325 and . Again and finally, at pages 581 and 582 of 48 R, the nition of merchant agent was clarified by Express ency. The final definition of merchant agent eliminated se agents who operate their agencies on premises owned controlled by Express Agency or a railroad. In this pect, the definition was narrowed; in no respect was roadened. Because the definition was narrowed, it was essary to eliminate a number of merchant agents from

Express Agency's claim for refund of contributions [48 R 389, 400, 404, Exhibits XXXI-A, XXXI-B, XXXI-C, XXXI-A(1), XXXI-B(1), XXXI-C(1)]. The final definition of merchant agent in the record and quoted at page 5 of Express Agency's main brief follows:

> "Individuals, corporations or partnerships who, in conjunction with or in addition to some other activity entirely outside of the railroad industry, act as Express Agent and have their Express office on premises which they control by reason of ownership or lease or rights superior to that of the Express Agency. Any one of these agents is permitted to have a part or all of the work performed by any of his designees. These agents are paid generally on a commission basis; however, a few are paid a fixed allowance or stipulated sum per month, and a few a commission plus a fixed allowance per month. These have been designated as merchant agents and may be subdivided as follows:
>
> "(a) A merchant or small business man who conducts an independent business and at the same time carries on the express work in his regular place of
> 3805 business such as a grocery store, hardware store, garage, etc. These may be further subdivided as follows:
>
> "A. Those who have no connection whatever with any railroad.
>
> "B. Those who act as caretaker of a station for a railroad, or have some other incidental connection in the railroad industry.
>
> "(b) A doctor, priest, minister, public official, who at the institution where he is employed or engaged in some other activity represents the Express Agency as agent.
>
> "(c) A housewife who conducts her Express Agency in her home.
>
> "(d) An employee of a business not within the railroad industry who with the consent of his employer has the Express office in his employer's place of business." (R 581, 582.)

The first paragraph of this definition would be more

ssive of the facts if the second sentence of the first
raph read as follows: "Merchant agents may and
ally do have a part or all of the Express work per-
d by their assistants, helpers, and employees who are
and fired and paid by the merchant agents without
pervision whatever by Express Agency."

ress Agency's claim for refund was tried in these
edings on the basis of this and other definitions in
ecord. Concessions were made and testimony and
evidence introduced on its basis. The agents listed
hibits XXXI-C and XXXI-C(1) fall within this defi-
(48 R 325, 326, 400, 581, 582, 614, 615, 616).

miner Funk, sitting as trial judge, has, without
iff's consent, and contrary to plaintiff's wish, changed
storted the complaint. These distortions have made
ner Funk's report unduly lengthy and confusing
.

example, he has left out of the definition of "mer-
agents" those who operate the Express Agency in
rocery store or other merchants' store business and
ay also act wholly independent of their grocery and
s business as a caretaker of a station for a railroad.
ss Agency considers such agents as merchant agents
nder its Category 6(a)B, and as merchant agents
ot employees. With respect to such agents, Express
Agency has not sought and has not had to obtain from
ilroad permission to have the agency conducted by
ent or conducted on any particular premises. The
at the merchant agent also acts as custodian for the
d has no connection whatever with his agreement
Express Agency to act as merchant agent. Never-
, Examiner Funk has included such agents in his
on of "caretaker or custodian agents" (Funk's
11, 12, 21).

ome cases, Express Agency has arranged with a railroad, in accordance with Article XI, Section 1 and Article IV, Section 1 of the uniform agreement between the railroads and Express Agency (Exhibit 1 37 R 9), for a caretaker or custodian to act as express agent and to operate the express agency in the depot of the railroad. In such cases, the agent has been considered a joint agent or at times in express circles has been referred to as "custodian agent" or "caretaker agent." Such agents have been conceded for the purpose of these proceedings to be employees of Express Agency [48 R 580, 581, Express Agency's Category 5(a)].

For further example of the distortions of the definitions of record, attention is invited to Examiner Funk's classification of "fixed allowance agents" (Funk's Report 13, 14, Finding of Fact 11 at page 20). The record shows and, in fact, Examiner Schoene in his first report states that it is immaterial whether an agent is paid a commission or a fixed allowance. In either case, the agent is required to pay the expenses of his office from the amount he receives. Even Examiner Funk did not make a separate classification of those agents who are paid a commission plus a fixed allowance (Schoene's First Report 3, 4, B. O. 39-502 p. 4, 48 R. 230, 325, 326, 579, 580, 581, 582).

With respect to fixed allowance agents, Examiner Funk in Footnote 7 on page 9 of his report refers to an objection of Mr. Hartung, Express Agency's attorney in the 1937 hearing, to a question relating to fixed allowance agents. Mr. Funk evidently overlooks the fact that the hearing in 1937 was heard pursuant to Board order of October 28, 1937 which limited the hearing to "persons performing duties for the Railway Express Agency in return for compensation on a commission basis * * *."
3807 (Emphasis supplied.) Board Order 48-229 did not so limit the hearings beginning in 1948. B. O. 48-229 limited the hearings, in so far as agents are concerned,

er they be paid on a commission or a fixed allowance to "joint agents, merchant agents and branch ."

Examiner Funk confined himself to the Board's and to the record definitions of the agents listed in ard's order, his report reasonably could have been d from its 169 pages to no more than 50 pages, in event the dust and smoke we are trying to penetrate have been removed.

is separation of agents on the basis of whether they id commissions or a fixed allowance, it seems that aminer's purpose is to get merchant agents or a f them in the same class with others conceded by s Agency to be employees for the purpose of these dings so as to strengthen the position Examiner has taken that since Express Agency admits joint to be employees for these proceedings, and since gents and merchant agents are similar in many re- merchant agents also must be considered as em- .

iner Funk, in order to get some of the merchant in the classification to which he has assigned joint found it necessary also to distort the record defi- f joint agents. The record definition reads:

> Individuals who are regular full time railroad nts and who concurrently with their railroad duties as agents for Express Agency. Railroad and ex- ss work are performed on premises furnished by railroad. They are paid by the railroad for their road work and by Express Agency for their express k. For their express work they are paid a com- sion,or stipulated sum per month. These are called nt railway-express agents.' " (48 R 580.)

iner Funk's definition of joint agents is:

>) Individuals who serve as railroad agents and concurrently with, or in addition to, their rail-

> road work also serve as agents for the Express Agency. These individuals have also been referred to as 'joint agents' and as 'joint employees'. Included in this group are those who devote all of their working time to their work as joint railroad-express agents, and those who are also engaged in some other business activity or activities. All of these individuals have been conceded by the Express Agency to be its employees except those who may perform their express work, or both their railroad and express work, on premises not controlled by either the Express Agency, or the railroad, through ownership, lease, or some other arrangement." (Funk's 11.)

3808 Please note page 16 of Funk's Report where he refers to Express Agency's concession that for the purpose of these proceedings joint agents are its employees.

There are important similarities and important dissimilarities between the joint agent and the merchant agent as defined in the record.

Probably the most important similarity is the fact that each may (and the merchant agent usually does) employ others to assist him in his business including his express work, and such assistants in either case are hired and fired and their wages and hours of work are determined by the agent free from any supervision whatever on the part of Express Agency. This was the factor most persuasive in Express Agency's initial position that joint agents as well as merchant agents were not employees under the Acts.

The important differences between the joint agents and he merchant agents and the differences which persuaded Express Agency to treat merchant agents as independent contractors and to concede for the purpose of these proceedings that joint agents are employees are:

> (1) The joint agents are full time employees of railroad and as such full time employees earn their livelihood in the railroad industry covered by the Acts here involved. The merchant agents are independent

ness men handling the express agency business
side line or part of their regular business. As
pendent business men, they and their employees
subject to the obligations and entitled to the bene-
of the Social Security Act as distinguished from
Railroad Retirement and related acts. (48 R 26,
6, 100) Title 42 U. S. C. Secs. 301, *et seq.*
) The express business performed by the joint
t is performed on railroad premises in accordance
a contract entered into between Express Agency
the railroad employing the joint agent. This con
t is the standard agreement executed between
press Agency and railroads. Article XI, Section
nd Article IV, Section 1 thereof provide for the
by Express Agency of the railroad premises and
Express Agency may arrange with the railroad
t for the conduct of the express agency. The
hant agent, on the other hand, himself furnishes
place where the express business of his merchant
cy is to be conducted.

cord for taking testimony was closed by Examiner
vember 6, 1950 (48 R 785, 786). The Telegraphers,
s, and Express Agency, by letter of which copies
a part of the appendix hereto, suggested to the
r willingness to waive oral argument. No one,
such letters, requested oral argument and no one
n the Telegraphers, the Clerks and the Express
nd the Examiner participated therein.

ner Funk insisted on oral argument and his reason
was made evident when he introduced new evi-
en though he had previously closed the record,
gh the record had not been reopened and even
notice was given to the parties of any intention
xaminer's part to reopen the record.

on is invited to pages 5 through 10 and 19 and 20
anscript of oral argument heard October 6, 1954.
n will be noted an effort on the part of Examiner
ugh cross-examination of Express Agency's coun-

sel to impeach Express Agency's evidence that merchant agents are not in line for promotion as are employees. Examiner Funk did this through the Express Messenger, Express Agency's official magazine, issue of November-December, 1951, which shows (1) a picture of Express Agency Superintendent West congratulating Merchant Agent Schreiber, who testified in this case, on his retirement and (2) a notation that Mr. Schreiber's son was appointed agent at Tell City, Indiana to follow his father, retired. Examiner Funk mistakenly assumes that the appointment of the son represents a promotion whereas the drug store of his father, including the merchant agen-
3810 cy handling express business, was transferred to the son. Therefore, the incident of the appointment of Mr. C. A. Schreiber as merchant agent at Tell City following the retirement of his father as merchant agent supports Express Agency's contention that frequently the transfer of a merchant agent's primary business (drug store) to another includes the transfer of the express business handled by the merchant agent.

It is respectfully submitted that this action of the Examiner expressed an attitude of mind which was not and is not conducive to an unbiased consideration of the facts and law in the case.

Finally, when pressed, Examiner Funk ruled that Express Agency might submit "a statement" explanatory of the new evidence which Examiner Funk produced and upon which he cross-examined counsel. That "statement" was furnished Examiner Funk in the form of an affidavit made by C. A. Schreiber, son of Merchant Agent Witness C. D. Schreiber. Presumably, the original of that affidavit is a part of the "entire record in these proceedings" upon which the Examiner makes his Findings of Fact and Conclusions of law and which has been attached to his report to the Board (Funk's 18). For ready reference, it is attached hereto and made a part of the appendix. The Board will find it quite expressive of an independent contractor relationship.

Illustrative of Examiner Funk's attitude of mind is his misinterpretation of the case of *Adams* v. *Railroad Retirement Board*, 214 F. 2d 534 (C. A. 1954) (Funk's 138, 139). It is evident from the quotation taken from the Retirement Board's brief in that case and set forth at Funk's 139 and from the Court's opinion that the Board ruled "Electric" was a non-employer under the Railroad Unemployment Insurance Act, that the individuals involved were employees of "Electric" in the performance of the work involved, and, therefore, that such individuals were not covered by he Acts. The Board in its brief made out a very strong ase on the point that the individuals were employees of "Electric", and on that point the Court held with the Board. The Court also held, however, that "Electric" 3811 was an employer under the Acts with respect to the work involved, as it was a "company which is diectly or indirectly owned or controlled" by an employer, in this case, "Power" (Railroad Retirement Act, Section). Contrary to Examiner Funk's statement, the subidiary company upon the payroll of which the individuals ere carried was held to be an "employer" under the cts with respect to the work involved even though the ork was for "Power," the parent company.

The *Adams* case is very much in point and is authority or the proposition that the individuals employed by merhant agents are employees of merchant agents and not f Railway Express Agency. The *Adams* case differs from he instant case in that the Electric Company was an emloyer under the Acts whereas merchant agents are not.

We know that the Board will not be misled by Examiner nk's misinterpretation; and we feel confident that Exniner Funk did not intend to mislead. This incident merely illustrates that Examiner Funk has approached the problem with a mind so closed by bias that he fails to comprehend a case which holds contrary to his evidently predetermined views.

The foregoing is set forth as preliminary in order to afford the Board a measure of understanding of the atmosphere in which the hearings herein were had and in which the Examiner's report was made.

In view of this atmosphere and in view of the length of the record, oral argument before the full Board is respectfully requested.

3812 Exceptions to Findings of Fact

Express Agency excepts to Findings of Fact:

1. No. 7 because of its lack of clarity and its implication that in the absence of the appointed merchant agent the "duly authorized acting agent" represents the Express Agency. It implies that the acting merchant agent is "duly authorized" by Express Agency when, in fact, the merchant agency, in the absence of the merchant agent, may be operated by any one or more of a number of individuals unknown to any representative of the Express Agency except the merchant agent himself.

In no case does the merchant agent seek or obtain authority from Express Agency to appoint an acting agent. For example, Merchant Agent Burns testified that his son or daughter was taking care of his merchant express agency's business in his absence, that he did not notify anybody connected with Express Agency that he was leaving his agency, and that he did not ask anybody connected with Express Agency whether it would be proper for him to turn over the supervision of the express interests to his daughter (48 R 64).

For further example, Agent Schreiber testified that if he wanted to, he could go on a spree for three months and that his son, who assisted him in express agency work and, in fact, did most of the express agency work, could go with him and his express business would be taken care of by his other employees and Express Agency would know nothing about it (48 R 185, 186).

For further example, Merchant Agent Westfall testified that most of the express work at his agency is done by a Mr. Lagrande who is employed by him largely to make ice cream and who was employed by him without consultation with any representative of Express Agency. He testified that in so far as he knew, the Express Agency was not aware that Lagrande was performing the express work (48 R 203).

Rule 820 of the General Rules and Instructions (Exhibit XXXVII, 48 R 516) does not apply to merchant agents. It does apply, however, to agents who are employees such as salaried agents and, therefore, salaried agents, as
3813 distinguished from merchant agents, are required to
obtain authority from their superiors to delegate their work to an assistant agent before leaving their job. (See Rule 5 quoted at Funk's 118.)

2. No. 10 in that the first sentence should read: "Prior to enactment of the Railroad Retirement legislation, accountants in the express service were interested only in two general categories of express agents, namely (1) those that were paid on a salaried basis and (2) those that were paid on a commission basis, a fixed allowance basis or a commission plus a fixed allowance basis."

Those agents paid on a salaried basis operated an agency where Express Agency paid all of the expenses.

Those agents paid on a commission basis or fixed allowance basis or fixed allowance plus commission operated an agency where most, if not all, of the expenses were paid by the agent from his commission or fixed allowance.

Merchant agents as defined by Express Agency paid all expenses of the operation of their agencies from their commissions or from the fixed allowance they received or from both except incidental expenses of forms, stationery, and in some cases a scale or other minor piece of equipment. (See testimony of typical merchant agents Jordan 48 R 93—110, Burns 48 R 56—93.)

The difference between the salaried agent and the fixed allowance agent for accounting purposes is made clear by the use of the term "fixed." The fixed allowance paid the agent represents the cost of operating the agency (48 R 230). The salary paid the salaried agent is but a part of the cost.

3. No. 11 because it includes as a general classification of agents "fixed allowance agents," which classification has no real significance in so far as the issue is concerned. A few merchant agents and a few joint agents are paid a fixed allowance instead of a commission, or a commission plus a fixed allowance. We agree with Examiner Schoene that whether the individual is paid a fixed allowance or a commission makes no material difference (Schoene's first 3, 4).

3814 4. No. 13 because it is an attempt to confuse the issues by distortion of definitions of record upon which Express Agency made certain admissions and concessions, and introduced testimony in which reference was made to the definitions of record. (See Preliminary Statement and 48 R 8, 323-327, 388-390, 408, 415-418, 579-584.)

Exception is taken particularly to Item 4 of Finding 13 because it does not include corporations and partnerships as well as individuals and is a distortion of Express Agency's definition or Category 6 (48 R 581, 582).

Examiner Funk states in Note 15 on page 12 of his report that Express Agency "identified individuals rather than 'corporations or partnerships' as the merchant agents at the various localities served by agents." Attention is

vited to Sheet B12 of Exhibit XXXIC in which Loma
nda Sanitorium is listed and to Exhibit XXXIC-(1) list-
g Puget Sound Navigation Company (48 R 400). See
so opinion of Lester P. Schoene dated May 20, 1942, then
eneral Counsel for the Railroad Retirement Board and
w attorney for the Telegraphers in this case, with re-
ect to the employees of Loma Linda Sanitorium who
tually perform the express work (L 42-306).

Attention also is invited to the testimony of Lowell S.
orton to the effect the merchant agency at Nauvoo, Illi-
ois was operated by a partnership known as "Horton's
andard Service." Express Agency's Form 100, made
uch of in these proceedings, was signed "Horton's Stand-
d Service by Lowell S. Horton" (48 R 24, 25, 30).

See also the testimony of L. C. Jordan with respect to
e merchant agency at Fremont, Michigan which was
erated as a part of the business and the partnership
own as "Jordan's" (48 R 95, 97).

5. No. 15 because of the distorted definitions in Find-
g 13, Finding 15 should also name fixed allowance agents,
the only difference between the fixed allowance agent
d the commission agent, be the commission agent joint
or merchant, is the manner of payment.

15 6. No. 16 because it adds to the confusion in that
it does not state Express Agency considers fixed
owance agents who are merchant agents as independent
ntractors and not employees; and also because it fails
show that fixed allowance agents are sometimes mer-
ant agents (48 R 230).

7. No. 19, particularly the last sentence thereof, in that
is too indefinite to be understood; and particularly in
at said sentence fails to state that only those rules which
in the nature of specifications as to results apply to
merchant agent.

To illustrate, reference need be made but to one rule, to wit, Rule 820 of the General Rules and Instructions (Exhibit XXXVII, 48 R 516) reading:

> "No employe is permitted to delegate to another person any portion of his duties, unless authorized to do so by his supervisor."

Six merchant agents testified, namely, Roberts, Horton, Burns, Jordan, Schreiber and Westfall. Although Examiner Schoene in his second report at page 36 stated that Barney Roberts was not typical of merchant agents, it is not so contended now. The evidence is undisputed that Merchant Agents Horton, Westfall, Schreiber and Jordan are typical merchant agents (48 R 271). The Clerks at page 9 of their main brief stated: "Those merchant agents, whose names appear in the record, are typical of the general pattern of merchant agents who perform work for the Agency as merchant agents (Tr. 271)."

Agent Horton testified (48 R 27) that one of the employees of his partnership who took care of the books of the partnership made out the reports to Railway Express Agency and that she did so without knowledge, in so far as Mr. Horton knew, on the part of any other representative of Express Agency. This lady and the other employees of Horton's Standard Service who performed express work were the employees of the partnership; their wages were paid by the partnership and they were entirely controlled by the partnership (48 R 26, 27, 33).

Attention is invited to the facts set forth at page 55 of Express Agency's main brief.

3816 It is unnecessary to burden the Board with the many other rules which do not apply to merchant agents, such as Rules 827, 832 and 890.

8. No. 20 in that it fails to include a statement to the effect that in so far as such bulletins affect the merchant agent, they have to do with specifications of the work (48 R 239).

9. No. 22 in that it is incomplete. It does not show that

dividuals seeking employment as employees in the
sense of that term in a division of a Superintendent
xpress Agency must sign Express Agency's Form
Application for Employment" and must be approved
e Superintendent, whereas, employees of merchant
s do not sign Form 100 and are hired and fired and
wages determined exclusively at the discretion of the
ant agent without any supervision whatever by Ex-
Agency (48 R 26, 64, 66, 232, 233, 242).

No. 25 in that it does not make clear that the mer-
agent furnishes any motor vehicle used at his ex-
agency. See Finding of Fact No. 38.

No. 33, particularly the last sentence thereof, in
t is contrary to the evidence. See Exhibits XXXIA,
No. B-7, and XXXIC, sheet No. B-12, listing "Col-
of Medical Evangelist also known as Loma Linda
rium, its employes," and XXXIA(1), listing "Puget
Navigation Co., its employes" (48 R 400).

No. 34 in that it is not complete and should, in sub-
read:

> "The express service rendered at the merchant
> gencies is generally performed during normal or
> stomary business hours of the main business, such
> drugstore business, of the merchant agent, and
> ch hours are established at the discretion of the
> erchan agent wholly free from supervision by Ex-
> ess Agency. In a few cases, train schedules may
> quire the performance of express work outside these
> urs."

example, typical Merchant Agent Schreiber oper-
ted a drugstore and was open for business on Sun-
ays. He accepted express shipments on Sundays and
ept business hours at his own discretion, wholly
t consulting Express Agency with respect thereto.
uld not accept perishables on Sunday, because they
not be moved until Monday (48 R 173). See also

Merchant Agent Westfall, who also operated a drugstore (48 R 205, 206).

Horton's Standard Service, typical merchant agent, in addition to its express business, operated a service station, served Hancock County with bottled gas and was in the home appliance and coal business (48 R 24). Horton's Standard Service was open for business from 9:00 in the morning until 1:00 on Sundays and would accept express shipments during these hours or after hours. Express Agency had nothing whatever to do with the hours during which Horton's Standard Service would accept express shipments (48 R 32, 33). All of the business, including express, was handled in the partnership name of Horton's Standard Service (48 R 30).

The merchant agent at Fremont, Michigan is operated by the partnership known as "Jordan's" (48 R 97). In addition to its express work, Jordan's handled various appliances, had a contract with International Harvester Company and had a branch office of the Secretary of the State of Michigan for the issuance of licenses (48 R 94). Jordan's was not open Sundays and would not accept or deliver an express shipment on Sundays. Jordan's determined the hours it would be open for business, including express, free from any supervision by Express Agency (48 R 98, 107).

13. No. 40 because it is indefinite, misleading and contrary to fact. The merchant agents generally own the building in which the express business is conducted (typical Merchant Agents Burns, 48 R 64, 65, Jordan's, 48 R 96, Schreiber, 48 R 164, Westfall, 48 R 210). The express business is often operated as a depar ment or a part of a department of the merchant agent's entire business (typical Merchant Agents Jordan's, 48 R 96, and Burns, 48 R 72). The merchant agent furnishes the business ma-
3818 chines used in the express business at his agency (typical Merchant Agent Jordan's, 48 R 105). True

hat Jordan's business, other than express, requires
ain use of the business machines, but, nevertheless,
vestment is in the business of which express is a
ment. Merchant agents who perform pickup and de-
service own, maintain and insure their own motor
s used in such service (typical Merchant Agent
n, 48 R 25, 26, Jordan's, 48 R 95, 96, Burns, 48 R
.

ntion is invited to page 56 of Express Agency's
orief, from which it will be seen merchant agents
nvested in their business, of which express is a part,
$100,000.00, and have net annual incomes from such
ss up to $30,000.00. They are truly entrepreneurs.
No. 42, in that it is a conclusion of the Examiner's
ry to fact and law.

Express Agency excepts to the Findings of Fact
hole, because the Examiner has failed to incorpo-
sential facts therein or has so worded others as to
e and impair their import. In particular, the Ex-
should have found:

(a) The merchant agent furnishes the building or
arters where the express business is conducted
8 R 64, 65, 96, 164, 210, 237). The merchant agent
rnishes the telephone and may or may not, at his
scretion, list the name of Railway Express Agency
the local telephone directory; but if Railway Ex-
ess Agency is listed, such listing, like the furnish-
g of the telephone, is at the merchant agent's sole
pense (48 R 31, 68, 237). The merchant agent hires
d fires and determines the wages and the hours of
rk and all working conditions of all individuals
o work on express at his agency (48 R 26, 27, 242).
ch individuals are employed by the merchant agent
t work in his regular business, the main part of
ich may be a drug store, food and wholesale gro-
y business, general service business, etc.; but the
press work is handled along with the drug or other
siness of the merchant agent (48 R 26, 53, 77, 78, 84,

819 86). The merchant agent is not granted a vacation. When he takes time off from his business, the merchant agent makes his own arrangements for the conduct of his express business in his absence free from any supervision whatever from Express Agency (48 R 89, 185, 186, 241). The merchant agent furnishes the motor vehicle in those cases where he has contracted to furnish pickup and delivery service of express in his community; in such cases, the merchant agent buys, maintains, controls and carries his own insurance on the motor vehicle, all at his own expense free from any supervision on the part of Express Agency. The merchant agent, free from any supervision whatever by Express Agency, determines the routes and the speed at which the motor vehicle shall travel in the performance of pickup and delivery service (48 R 69, 100, 237). The merchant agent considers the individuals who perform the express work at his agency to be his employees and not the employees of Express Agency; and in many cases, the merchant agent carries Workmen's Compensation covering such individuals in the performance of all of their work, including express work (48 R 38, 102). When Workmen's Compensation is carried, the merchant agent stands the entire cost thereof (48 R 38, 102). Express Agency's general rules and instructions and bulletins are distributed to the merchant agents, but only those rules, instructions and bulletins which are in the nature of specifications of the work apply to merchant agents (48 R 239, 243, 244, 245). Even though a merchant agent's employees work in express, the merchant agent generally has considered them as exclusively under Social Security, rather than Railroad Retirement, and the merchant agent has paid Social Security taxes on their entire wages (48 R 26, 27, 100). The merchant agent often advertises express business along with his other business entirely at his own discretion and all at his own expense free from any
3820 supervision on the part of Express Agency (48 R 35, 36, 72, 73). Merchant agents have investments in their entire business, including express, up to $100,000

have enjoyed net annual revenues from all of
r business, including express, up to $30,000 (48 R
95, 109, 110).

) In November, 1943, in May 1947 and in May
, Express Agency filed with the Railroad Retire-
t Board claims for refund of contributions, or
ies paid as contributions, paid under protest pur-
t to Railroad Unemployment Insurance Act with
ect to the earnings of various individuals includ-
merchant agents, their assistants and employees.
claims detail the payments with the dates thereof
e with respect to the earnings of merchant agents
their assistants and employees. Such payments
ern the earnings of such individuals for the entire
od from the effective date of the Act, July 1, 1939,
ugh December 31, 1947, and such payments total,
er Exhibit XXXIC, $108,292.16, to which should
dded the sum of $524.73 as per Exhibit XXXIC-1,
ng a grand total of $108.816.89.

) Express Agency accountants will work out with
Board's accountants the interest due on such pay-
s.

XCEPTIONS TO CONCLUSIONS OF LAW.

ss Agency excepts to Conclusions of Law:

. 1 because it is contrary to law and contrary to

. 3 in so far as it relates to merchant agents,
istants and employees because in that respect it
ry to law and contrary to fact.

press Agency excepts to the Conclusions of Law
le because the Examiner has failed to incorporate
he essential conclusion that Express Agency is
o refund with interest thereon [illegible] the rate of 6%,
e of payment of contributions, or monies paid as
ions, with respect to the earnings of merchant
nd their assistants and employees.

3822 Argument.

Express Agency invites the attention of the Board to the argument in its main brief pages 45 through 66. In supplementation thereof and in response to statements made by Examiner Funk, Express Agency, states:

It is made abundantly clear at pages 45 through 53 of Express Agency's main brief that if the merchant agents and their assistants and employees are not common law employees of Express Agency, they are not employees under the acts. Under the common law as well as under the Acts the employer-employee relationship can exist only where the employer has the right to control and direct the manner of rendition of the work, not only as to the results to be accomplished by the work, but also as to the details and means by which that result is accomplished. *Williams* v. *U. S.*, 126 F. 2d 129 (7th Circuit) 132, cert. den. 317 U. S. 655, 63 S. Ct. 52; *Party Cab Co.* v. *U. S. of America*, 172 F. 2d 87 (7th Circuit) cert. den. 338 U. S. 818.

There can be no dispute that if the merchant agents are independent contractors they are not employees of Express Agency under the Acts. *Reynolds* v. *Northern Pacific Railway Company*, 168 F. 2d 934, cert. den. 335 U. S. 828; *Nicholas* v. *Denver and Rio Grande W. R. R. Co.*, 195 F. 2d 428; *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.* v. *Kelm*, 104 F. S. 745, affirmed as *Kelm* v. *Chicago, St. P., M. & O. Ry. Co.*, 206 F. 2d 831.

As said by Judge Major in *Williams* v. *U. S.* at page 132 of 126 F. 2d:

> "A number of elements have been enumerated as bearing upon the right to control, such as the right to hire and discharge persons doing the work (*Casement* v. *Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582; *Densby* v. *Bartlett*, 318 Ill. 616, 149 N. E. 591, 42 A. L. R. 1406), the method and determination of the amount of the payment of the workmen (*Simonton* v.

Morton, 275 Pa. 562, 119 A. 732), whether or not the person doing the work is engaged in an independent business or enterprise and, particularly, whether he stands to make a profit on the work of those working under him (*Barnes* v. *Myers*, 163 Md. 206, 161 A. 279, *Petzold* v. *McGregor*, 92 Ind. App. 528, 176 N. E. 640), which party furnishes the tools or materials with which the work is done (*Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 10 S. Ct. 175, 33 L. Ed. 440) and who has control of the premises where the work is done. *Murphy* v. *Herold Co.*, 137 Wis. 609, 119 N. W. 294."

3823 The merchant agent, exclusive of Express Agency:

(1) has the "right to hire and discharge persons doing the work (*Casement* v. *Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582; *Densby* v. *Bartlett*, 318 Ill. 616, 149 N. E. 591, 42 A. L. R. 1406)."

(2) prescribes the method and determines "the amount of the payment of the workmen (*Simonton* v. *Morton*, 275 Pa. 562, 119 A. 732)."

(3) "is engaged in an independent business or enterprise" and "stands to make a profit on the work of those working under him (*Barnes* v. *Myers*, 163 Md. 206, 161 A. 279, *Petzold* v. *McGregor*, 92 Ind. App. 528, 176 N. E. 640)."

(4) furnishes some of the tools and materials with which the work is done.

(5) "has control of the premises where the work is done (*Murphy* v. *Herold Co.*, 137 Wis. 609, 119 N. W. 294)."

The fact that the individual performing the work may furnish the tools, standing alone, would not necessarily mean that he was an independent contractor. And the fact that the employer may furnish the tools, standing alone, would not necessarily mean that the individual performing the work was an employee. All circumstances must be considered. In the present case, the elements enumerated in the case of *Williams* v. *U. S.*, *supra*, overwhelmingly establish that the merchant agents are not subject to the right of the Express Agency to direct the manner of the rendition of their work. The merchant agents are independent contractors as a matter of law.

Examiner Funk, evidently at a loss for another answer, has urged that items 1 and 2 listed above from *Williams v. U. S.*, 126 F. 2d 129 at 132, may not be considered or are of no importance because Express Agency has conceded that joint agents are employees and joint agents also have the right to hire and discharge persons doing the work and determine the method and amount of payment of the workmen. Express Agency has conceded that joint agents are employees for the purpose of these proceedings, but Express Agency does not concede that elements or characteristics 1 and 2 referred to above spell out an employer-employee relationship; on the contrary, Express 3824 Agency initially urged that because of these very elements, the joint agents were not employees. Express Agency reluctantly expressed a willingness to concede that joint agents were employees and, therefore, these proceedings were reopened in 1948. This concession was made primarily because of the important difference between merchant agents and joint agents as set forth in the preliminary statement of these exceptions, the major difference being that joint agents, as defined in the record, are full time employees of a railroad and earn their livelihood in the industry, whereas merchant agents are engaged primarily in some business or activity wholly outside the railroad industry and under the Social Security Act.

The right to hire and discharge the persons doing the work, and the right to determine the method and the amount of payment of the workmen are of paramount importance.

The case of *Williams* v. *U. S.*, 126 F. 2d 129 (7th Circuit), cert. den. 317 U. S. 655, 66 S. Ct. 52, is quite in point. It concerned an action to recover taxes plaintiff had been required to pay as social security taxes. The issue turned on whether plaintiff was an independent contractor or an employee of the establishments where his orchestra performed. In holding plaintiff to be an independent contractor, Mr. Justice Major speaking for the Seventh Circuit Court of Appeals said at page 133:

> "We have already concluded, not inconsistent with the findings of the court below, that the establishments had no right to hire or discharge members of the orchestra. To our mind, this circumstance alone comes near being decisive. *It is difficult to conceive of an employer-employee relationship without such a right on the part of the employer. It is equally inconceivable that such right should rest solely in the hands of the employee.* Without this right there could be no effective control by an employer. As was said in *Pioneer Construction Co.* v. *Hansen*, 176 Ill. 100, 108, 52 N. E. 17, 19: '* * * and, inasmuch as the right to control involves the power to discharge, the relation of master and servant will not exist unless the power to discharge exists.* * *' " (emphasis supplied)

The merchant agent is a small bsuiness man and as such subject to the Social Security Act. Title 42 U. S. C. Secs.
301 et seq. Therefore, if the merchant agent is held
3825 to be an employee of Railway Express, he will be
subject at the same time during the same hours of employment to the Social Security Act and the Railroad Unemployment Insurance Act and related acts. The joint agent unquestionably is an employee of his railroad employer and, therefore, unquestionably is subject to the Railroad Unemployment Insurance Act and related acts. If the joint agent should be held to be an independent contractor in his relation to Express Agency, he would be a small business man under and subject to the Social Security Act, in which event he also would be subject to both the Social Security Act and the Railroad Unemployment Insurance Act at the same time during the same working hours. The practical and sensible interpretation of the acts

suggested by Express Agency places the joint agent wholly under the Railroad Retirement Acts and the merchant agent and his assistants wholly under the Social Security Act.

The language of the Sixth Circuit Court of Appeals in the case of *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51 at 56 is quite appropriate:

> "We may here repeat what was said in *Gulf Oil Corporation* v. *United States, supra*: 'All of the adjudicated cases which involve the same question, or substantially the same have been decided in favor of plaintiff's contention.' 57 F. Supp. at page 380. It is unnecessary to rehearse the evidence to enumerate the indicia of the relationship of independent contractor and employee. 'The quality of the relationship is to be judged by the presence or absence of no single evidentiary factor but by an over-all view.' *Anglim* v. *Empire Star Mines Co., supra* (129 F. 2d 917). *Congress could scarcely have meant that men doing business like the agents in this case were to enjoy the benefits of unemployment allowances; and if they were not employees of the company, their assistants were not. Texas Co.* v. *Higgins*, 2 Cir., 118 F. 2d 636, 638." (emphasis supplied)

3826

Conclusion.

It is respectfully submitted that the proposed Findings of Facts and Conclusions of Law recommended by Examiner Funk be rejected and that new findings of fact and conclusions of law be formulated in conformance with the exceptions herein set forth; and

It is respectfully urged that the matter be set for oral argument before the full Board.

Respectfully submitted,
Railway Express Agency, Incorporated
By Fulmer Long,
Attorney for Railway Express Agency, Incorporated,
219 East 42nd Street,
New York 17, New York.

I hereby certify that I have this day served the foregoing exceptions and request for oral argument upon all parties of record and upon the examiner in this proceeding by mailing a copy thereof properly addressed to each party for the attorney or representative of each party and to the examiner.

Dated at New York, New York this .... day of March 1956.

Fulmer Long,
Attorney for Railway Express Agency, Incorporated.

3847 BEFORE THE RAILROAD RETIREMENT BOARD.

In the Matter of the Status, under the Railroad Retirement and Railroad Unemployment Insurance Acts, of joint agents, merchant agents, branch agents and certain other individuals performing express work, and the demand of Railway Express Agency, Incorporated, for refund of contributions based on compensation of such individuals.	Jurisdictional Docket No. 2-2A.

REPLY OF BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES TO EXCEPTIONS OF RAILWAY EXPRESS AGENCY, INCORPORATED TO FINDINGS OF FACT AND CONCLUSIONS OF LAW RECOMMENDED BY EXAMINER OMER M. FUNK AND REQUEST FOR ORAL ARGUMENT THEREON.

To the Honorable Members of the Railroad Retirement Board:

Exceptions have been filed by the Railway Express

Agency, Incorporated (hereinafter referred to as the Express Agency) to the findings of fact and conclusions of law recommended by Examiner Omer M. Funk and oral argument thereon has been requested.

Now comes the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter referred to as the Brotherhood) in reply to the exceptions filed by the Express Agency.

A reading of the Express Agency's exceptions clearly indicates that other than charging Examiner Funk with distortion of the record, a predetermined view, and an "attitude of mind" not conducive to an unbiased consideration of the facts and law in the case, the Express Agency has covered and commented upon substantially the same
3848 material points contained in its opening brief.

1. In its exception No. 1 to finding of fact No. 7, the Express Agency contends such finding lacks clarity in its implication that, in the absence of the merchant agent, the person acting in his stead is "duly authorized" by the Express Agency; whereas, actually, the merchant agent can designate anyone to handle the express business without reference or notification to the Express Agency.

Assuming arguendo that Express Agencys' exception to finding of fact No. 7 is true, nevertheless, the fact remains the designation of an assistant or substitute by the merchant agent to handle his express agency business without consulting the Express Agency is not of sufficient weight to alter the fact that the Express Agency has the right, whether actually exercised or not, to supervise the manner of rendition of services whether performed by the assistant or the merchant agent.

Both the 1938 hearings and the hearings designated Jurisdictional Docket No. 2-2A developed that the Express Agency controls and directs the hours of service in relation to express services and requires the merchant agent or his assistant to accept shipments after the regular business hours; he is required by the Express Agency to meet trains at any time, even outside regular business hours, when the nature of the express services makes it necessary. If the merchant agent does not handle express shipments and perform services according to the Express Agency's instructions, the Express Agency may terminate the employment relationship at any time. (See pp. 28, 36 and 45, Hearings of 1938; pp. 380-382 and 445 of the transcript, Jurisdictional Docket No. 2-2A.)

Furthermore, the right to hire and fire a merchant agent's
assistant or substitute also applies to a joint agent
3849 of Express Agency who has been conceded by it to
be an employee within the meaning of the Railroad
Retirement and Railroad Unemployment Insurance Acts.

2. The Brotherhood has difficulty in comprehending the Express Agency's exception No. 2 to finding of fact No. 10 since the manner of payment, whether salary, commission, fixed allowance, or fixed allowance plus commission, is not controlling or persuasive. The language of Section 1(h) of the Railroad Retirement Act and Section 1(i) of the Railroad Unemployment Insurance Act provide that the "term 'compensation' means any form of money remuneration."

3. The above item 2 states the Brotherhood's reply respecting Express Agency's exception No. 3 to finding of fact No. 11.

4. In its exception No. 4 to finding of fact No. 13, the Express Agency contends that item (4) thereof should have included corporations and partnerships as well as individuals in referring to merchant agents. The Brotherhood points out that the individuals, employees of the corporation or partnership or partners of such partnership, performing express operations are considered employees of Express Agency with respect to such express service and compensation therefor.

5. The Brotherhood finds no substance in Express Agency's exception No. 5 to finding of fact No. 15 for the reason previously stated in item 2 of this reply to Express Agency's exceptions.

6. Again, the Brotherhood's answer to the Express Agency's exception No. 6 to finding of fact No. 16 has been stated in item 2 hereof. Incidentally, Express Agency's exception No. 6 is merely a restatement relative to the subject of compensation.

7. Express Agency's exception No. 7 to finding of fact No. 19 apparently is an attempt on its part to persuade the Board to accept Express Agency's conclusion that the General Rules and Instructions of Express Agency 3850 are in the nature of specifications in their application to the merchant agent. This is nothing more than a self-serving statement which the record reflects and is unsupported by the facts. The report of Examiner Funk at pages 60-68 and footnotes thereon state clearly the facts and the ultimate conclusion based thereon. Furthermore, there is no material distinction between specification and instruction in their application to the performance of express operations. It simply means the merchant agent is given specific instructions as to the method and manner of the rendition of the work of Express Agency.

8. In its exception No. 8 to finding of fact No. 20, the Express Agency raises substantially the same point as covered in item 7 above.

9. Express Agency's exception No. 9 to finding of fact No. 22 has no merit since assistants to merchant agents perform the same regular or routine express work as assistants to joint agents and such assistants have been conceded by the Express Agency to be employees for the purposes of the Railroad Retirement and Railroad Unemployment Insurance Acts.

10. The Express Agency's exception No. 10 to finding

of fact No. 25 is answered adequately by Examiner Funk's finding of fact No. 38 at page 28 of his report and is supported by the record at pages 237, 238, 300, 452 and 460 of the transcript, Jurisdictional Docket No. 2-2A.

11. The statement in Express Agency's exception No. 11 to finding of fact No. 33 is redundant. See item 4 hereof for the Brotherhood's reply.

12. Express Agency's exception No. 12 to finding of fact No. 34 has used the vague and indeterminate expression "few" with reference to the occasions when merchant agents are required to perform express work outside normal or customary business hours because of train schedules.

The fact remains that they may be required to per-
3851 form express work outside these hours when neces-
sary. (See pp. 28, 36 and 45, Hearings of 1938; pp. 380-382 and 445 of the transcript, Jurisdictional Docket No. 2-2A.)

13. The Brotherhood's reply to Express Agency's exception No. 13 to finding of fact No. 40 is that such finding correctly states the fact that merchant agents have comparatively little, if any, cash investment in the express service as such. The Express Agency is attempting to distort the picture as to any such investments by citing the over-all investment in a business of which the express business is a negligible and remote part and by citing net annual income of a business of which the annual net income from express business is likewise a negligible part.

14. Express Agency's exception No. 14 to finding of fact No. 42 is that it is a conclusion of the Examiner contrary to fact and law. Such finding is in accord with the actual conduct of merchant agents and the assistants engaged by them to perform express services, including pick up and delivery work in vehicles owned by such merchant agents and, contrary to Express Agency's statement, is in conformity with the facts and the law.

15. Express Agency's omnibus exception No. 15 to the Examiner's findings of fact as a whole repeats exceptions theretofore itemized.

Brotherhood's Answer to Express Agency's Exceptions to Conclusions of Law.

1. Express Agency's exception No. 1 to conclusion of law No. 1 is without foundation either in fact or at law.

2. Express Agency's exception No. 2 to conclusion of law No. 3 is contrary to the facts and the law.

3. Express Agency's exception No. 3 to the Examiner's conclusions of law as a whole is based on the false premise
that the Express Agency is entitled to refund with in-
3852 terest thereon at the rate of 6 percent, from date of
payment of contributions, or monies paid as contributions, with respect to the earnings of merchant agents and their assistants and employees.

Argument.

The definition of the employee's status as set forth in the Railroad Retirement and Railroad Unemployment Insurance Acts goes beyond and is more precise than the common-law definitions pertaining to the master and servant relationship or employer-employee relationship as distinguished from that of an independent contractor. Therefore, what the statutes have done is to provide a particular test and make the statutory test govern in establishing for statutory purposes an employer-employee relationship rather than the common-law definition.

The same thought is expressed with respect to the statutory definition as related in the Social Security Act and the Fair Labor Standards Act in the case of *Grace* v. *Magruder,* 148 F. 2d 679, where the court said at page 681:

> "* * * As Judge Parker has said, recently, speaking

> for the Fourth Circuit Court of Appeals: 'Common law rules as to distinctions between servants and independent contractors throw but little light on the question involved. The Social Security Act, like the Fair Labor Standards Act * * * was enacted pursuant to a public policy unknown to the common law; and its applicability is to be judged rather from the purposes that Congress had in mind than from common law rules worked out for determining tort liability.' "

Hence, the same rule can properly be said to apply with respect to the Railroad Retirement, the Railroad Retirement Tax and the Railroad Unemployment Insurance Acts; namely, that the statutory definition as contained in those Acts should be applied in accordance with the purposes and objectives of Congress, rather than by the common-law formula. Under the statutory definition that an employer-employee relationship exists if the individual
3853 is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his services, the record shows conclusively the Express Agency has had and continues to have, whether exercised or not, the right to control and direct the manner of rendition of the express work performed by merchant agents, their assistants and employees.

Merchant agents are generally furnished with a copy of the Express Agency's General Rules and Instructions and particular attention is directed to pages 60-68 of Examiner Funk's report in Jurisdictional Docket No. 2-2A and the footnotes appearing therein, dealing with the many rules applicable to merchant agents establishing the right of the Express Agency to control and direct the manner of rendition of the express work performed by the merchant agents, their assistants and employees.

These considerations, coupled with the fact there is little essential difference between the express operations and services performed by joint railroad-express agents, their assistants and employees and the express operations and services performed by merchant agents, their assistants and employees, constitute factors that such express operations and services must be considered subject to the Railroad Retirement Act and the Railroad Unemployment Insurance Act; that the Express Agency is and should be held to be an employer under the Acts; that such merchant agents, their assistants and employees are and should be held to be employees under the Acts.

Respectfully submitted,

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Geo. M. Harrison, *Grand President,*
Robert Morgan, *Vice Grand President,*
James L. Crawford, *General Counsel.*

3854 Certificate of Service.

I hereby certify that I have this day served the foregoing reply to exceptions of Railway Express Agency, Incorporated upon all parties of record and upon the Examiner in this proceeding by mailing a copy thereof properly addressed to each party for the attorney or representative of each party and to the Examiner.

Dated at Cincinnati, Ohio, this ____ day of May, 1956.

James L. Crawford, *General Counsel*
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees,
1015 Vine Street,
Cincinnati 2, Ohio.

3918 Form No. G-21

This form is to be used only by the Secretary of the Board or as otherwise specifically directed by the Board.
Transcript No. Special Page 1 of 2 pages
Date Transcript Released

UNITED STATES OF AMERICA.

RAILROAD RETIREMENT BOARD.

Transcript of Board Orders.

I certify that the following is a true and correct transcript of Board Order Numbered 56-235, transcribed from the record of proceedings of August 29, 1956.

Mary B. Linkins,
Secretary of the Board.

B. O. 56-235

DECISION AND ORDER OF BOARD IN JURISDICTIONAL DOCKET NO. 2-2A, IN THE MATTER OF THE STATUS, UNDER THE RAILROAD RETIREMENT AND RAILROAD UNEMPLOYMENT INSURANCE ACTS, OF JOINT AGENTS, MERCHANT AGENTS, BRANCH AGENTS AND CERTAIN OTHER INDIVIDUALS PERFORMING EXPRESS WORK, AND THE DEMAND OF RAILWAY EXPRESS AGENCY, INCORPORATED, FOR REFUND OF CONTRIBUTIONS BASED ON COMPENSATION OF SUCH INDIVIDUALS.

The examiner appointed by the Board on June 23, 1948 (Board Order No. 48-229), filed his report in this matter on December 29, 1955. Exceptions to the examiner's report and a reply to those exceptions were subsequently filed, and on June 28, 1956, the Board heard oral argument. The Board has independently reviewed the record, the briefs of the parties, the examiner's report, the exceptions thereto and the reply to those exceptions. After consideration of the issues, and the evidence and law thereon:

It is Hereby Ordered that the examiner's findings of fact, conclusions of law and reasons therefor be, and they hereby are, adopted as the findings of fact, conclusions of law, and the opinion of the Board, the Board thereby determining that:

1. The individuals referred to in the examiner's report as joint railroad-express agents, merchant agents, caretaker or custodian agents, "other commission agents", and fixed allowance agents, and the individuals engaged by them to perform, or to assist in performing work at the express office or the railroad station, as the case may be, including their pickup and delivery work in vehicles owned by the agents, are and have been at all times employees of the Express Agency with respect to their express work, within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts, except that no de-
termination is made with respect to the creditability
3919 of any pickup and delivery service performed at any
express office as a part of a general drayage business
conducted by the agent or his assistant.

2. The limited agents, and their assistants, are not and have not been employees of the Express Agency with respect to such work within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts.

3. The Railway Express Agency, Incorporated, is not entitled to a refund of contributions, under the Railroad Unemployment Insurance Act, based on the compensation of the individuals referred to in 1 above, but it was entitled to a refund of contributions, under the Act, on the compensation of the individuals referred to in 2 above, credit for which has already been taken by the Express Agency.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Railway Express Agency, Incorporated, *Petitioner,* *vs.* Railroad Retirement Board, *Respondent.*	No. 11924.

PETITION FOR REVIEW OF RAILROAD RETIREMENT BOARD ORDER NO. 56-235 MADE AUGUST 29, 1956.

(Filed Nov. 27, 1956. Kenneth J. Carrick, Clerk.)

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit.

The petition of Railway Express Agency, Incorporated, respectfully shows to the Court as follows:

I.

Nature of the Proceedings as to Which Review Is Sought.

Petitioner, a corporation organized under the law of Delaware, is a common carrier subject to Part I of the Interstate Commerce Act and as such is an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act, Title 45 U. S. C., Sections 228 a-y, and Sections 351 through 367.

These proceedings initiated by order of the Railroad Retirement Board dated October 28, 1937 and thereafter given Docket No. 2, reopened by Board Order of June 23, 1948 (Board Order No. 48-229) and thereafter given Docket No. 2-2a, and presently in the state of a final order of the Board made August 29, 1956 (Board Order No. 56-235) were designed to determine the status under the two acts

of certain of petitioner's representatives and their assistants and employees. Also involved is petitioner's claim for refund of contributions paid pursuant to Section 358, Title 45 U. S. C. (Railroad Unemployment Insurance Act), with respect to the earnings of said representatives, their assistants and employees.

By Board Order No. 48-229, made June 23, 1948, an examiner was appointed to take evidence at hearings for the purpose of the determination of the following questions:

> "(a) Are joint agents, merchant agents, branch agents, and certain other individuals performing express work, to be classified as employees under the Railroad Unemployment Insurance Act, and is the Railway Express Agency, Incorporated, entitled to a refund of contributions, under the Act, based on the compensation of such individuals?
>
> (b) Are joint agents, merchant agents, branch agents, and certain other individuals performing express work, to be classified as employees under the Railroad Retirement Acts of 1935 and 1937?"

By its Order No. 56-235, made August 29, 1956, the Board adopted the examiner's findings of facts, conclusions of law and reasons therefor, and ruled (1) that branch agents were not employees, but that all other agents, their assistants and employees (except those performing pickup and delivery service as a part of a general drayage business operated by the agent or his assistant) were employees of petitioner under the acts, (2) that petitioner had rightfully taken credit for any contributions paid by it with respect to branch agents, and (3) that petitioner is not entitled to refund of contributions paid with respect to any others.

At the beginning of the first hearing in Docket No. 2-2a, in accordance with its agreement previously made with Board representatives, petitioner conceded, for the purposes of these proceedings, and solely in the interest of compromise and in shortening an over-long case, that the joint agents and persons assisting them (excepting some performing pickup and delivery service) were petitioner's employees under the two acts.

Petitioner, during the course of the hearings in Docket No. 2-2a, reduced and limited its claim for refund of contributions to those paid with respect to merchant agents as defined in the record and the assistants and employees of such merchant agents.

Merchant agents were defined by petitioner in the record as follows:

> "6. Individuals, corporations or partnerships who, in conjunction with or in addition to some other activity entirely outside of the railroad industry, act as Express Agent and have their Express office on premises which they control by reason of ownership or lease or rights superior to that of the Express Agency. Any one of these agents is permitted to have a part or all of the work performed by any of his designees. These agents are paid generally on a commission basis; however, a few are paid a fixed allowance or stipulated sum per month, and a few a commission plus a fixed allowance per month. These have been designated as merchant agents and may be sub-divided as follows:
>
> (a) A merchant or small business man who conducts an independent business and at the same time carries on the express work in his regular place of business, such as a grocery store, hardware store, garage, etc. These may be further subdivided as follows:
>
> A. Those who have no connection whatever with any railroad.
>
> B. Those who act as caretaker of a station for a railroad, or have some other incidental connection in the railroad industry.
>
> (b) A doctor, priest, minister, public official, who at the institution where he is employed or engaged in some other activity represents the Express Agency as agent.

(c) A housewife who conducts her Express Agency in her home.

(d) An employee of a business not within the railroad industry who with the consent of his employer has the Express office in his employer's place of business."

Reference to merchant agents in this petition and in the record is to those within the definition of merchant agents in the record and not as limited in the examiner's report adopted by the Board.

II.

Facts Upon Which Venue Is Based.

The order sought to be reviewed is a final order of the Railroad Retirement Board. Review is sought in accordance with Section 355 (f) Title 45 U. S. C.

III.

Grounds On Which Relief Is Sought.

Petitioner's quarrel with the Board is only with respect to the merchant agents as defined in the record, as quoted under Item I of this petition, and their assistants and employees. The grounds on which relief is sought as hereinafter stated concern only such merchant agents, their assistants and employees.

(1) Major finding of fact #42 in the examiner's report adopted by the Board is antagonistic to finding of fact #41 that merchant agents "often arrange for other individuals, including relatives, to perform or assist them in performing such work. These individuals are selected and paid by the agents", and is antagonistic to finding of fact #13 (4) that merchant agents perform the express work on premises "not under railroad or Express Agency control".

(2) Major finding of fact #42 in the examiner's re-

port adopted by the Board is to a material extent based upon an erroneous concept of the law. The examiner under the heading "Discussion" sets forth in his report the reasons, which the Board adopts, for the findings of fact and conclusions of law. The examiner and the Board espouse the view that because petitioner has conceded joint agents and some other agents to be employees, every factor applying alike to merchant agents and joint agents or such other agents supports a conclusion that merchant agents also are employees. For example, this erroneous concept has been of material weight in persuading the examiner and the Board to hold of no material consequence the fact that the merchant agents, entirely independent of petitioner, hired and discharged, and determined the wages and working conditions of those who assisted them in their regular business and in their express business.

(3) Error was committed by the examiner and therefore by the Board, in striking from the record, and therefore refusing to consider, evidence that employees of a typical merchant agent were members of a union with which the merchant agent had a contract covering rates of pay and working conditions with respect to all the work performed for the merchant agent, including work in express and other business of the merchant agent.

(4) Major finding of fact #42 in the examiner's report adopted by the Board is not supported by substantial evidence.

(5) Major finding of fact #42 in the examiner's report adopted by the Board is contrary to the indisputable character of the evidence.

(6) The Board in adopting the examiner's report has failed or refused to make essential subordinate findings of fact and to clarify certain other findings of fact, all established by undisputed evidence, which together establish that the merchant agent is an independent contractor

in his relation to petitioner and therefore "not subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service". (Title 45 U. S. C. Sections 288a (b) and (c), and 351 (d) and (e).) Such findings of fact are:

(a) The merchant agent furnishes the building or quarters where the express business is conducted.

(b) The merchant agent has investments in his entire business, including express, up to $100,000 and has enjoyed net annual revenues from all of his business, including express, up to $30,000.

(c) The merchant agent hires and discharges all individuals who work on express at his agency, and the merchant agent determines their wages, hours and working conditions all independently of any supervision or control by petitioner. Such individuals usually are employed by the merchant agent to work in his regular business, the main part of which may be a drug store, food and wholesale grocery business, general service business or other business. The express work is done by such individuals along with the drug or other major business of the merchant agent.

(d) The merchant agent furnishes the telephone and may or may not, at his discretion, list the name of Railway Express Agency in the local telephone directory; but if Railway Express Agency is listed, such listing, like the furnishing of the telephone, is at the merchant agent's sole expense.

(e) The merchant agent often advertises express business along with his other business entirely at his own discretion and all at his own expense free from any supervision on the part of petitioner.

(f) The merchant agent furnishes the motor vehicle in those cases where he has contracted to furnish pickup and delivery service of express in his community; in such cases, the merchant agent buys, maintains, controls and carries his own insurance on the motor vehicle, all at his own expense free from any supervision on the part of petitioner. The merchant agent, free from any supervision whatever by petitioner, determines the routes and the speed at which the motor vehicle shall travel in the performance of pickup and delivery service.

(g) The merchant agent furnishes any business machines such as typewriters and computing machines used in his express business.

(h) The merchant agent considers the individuals who perform the express work at his agency to be his employees and not the employees of petitioner; and in many cases, the merchant agent carries Workmen's Compensation covering such individuals in the performance of all of their work, including express work. When Workmen's Compensation is carried, the merchant agent stands the entire cost thereof.

(i) The merchant agent is not granted a vacation. When he takes time off from his business, the merchant agent makes his own arrangements for the conduct of his express business in his absence free from any supervision whatever by petitioner.

(j) Even though a merchant agent's employees work in express, the merchant agent generally has considered them as exclusively under Social Security, rather than Railroad Retirement, and the merchant agent has paid Social Security taxes on their entire wages.

(7) The Board in adopting the examiner's findings of fact, conclusions of law and reasons therefor, erroneously accepts the examiner's evident conclusion that even though merchant agents may be independent contractors under the common law, nevertheless they are employees under the Railroad Retirement Act and Railroad Unemployment Insurance Act.

IV.

Relief Prayed.

Wherefore, petitioner prays:

1. This Court review the order of the Railroad Retirement Board and set the same aside insofar as it concerns merchant agents as defined in the record and their assistants and employees.

2. That this Court rule that merchant agents, as defined in the record, are independent contractors, and that such merchant agents, their assistants and employees are not employees under the Railroad Retirement Act and Railroad Unemployment Insurance Act.

3. That the Board be directed to refund contributions as claimed in the sum of $108,292.16, or in the alternative that the Board be directed to make further findings with respect to petitioner's claim for refund not inconsistent with the Court's ruling, and

4. That this Court grant petitioner such other and further relief as may be just and equitable.

Fulmer Long,
Attorney for Petitioner.

Fulmer Long, Esq.,
612 S. Clinton Street,
Chicago 7, Illinois,
Appearing on Behalf of Petitioner.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 11924

RAILWAY EXPRESS AGENCY, INC.,
Petitioner,
vs.
RAILROAD RETIREMENT BOARD,
Respondent.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS, RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenors.

Petition for Review of Order of the Railroad Retirement Board

APPENDIX TO RESPONDENT'S BRIEF.

Myles F. Gibbons,
General Counsel,
David B. Schreiber,
Associate General Counsel, Railroad Retirement Board,
Attorneys for Respondent.

Edward E. Reilly,
David M. Goldman,
Railroad Retirement Board,
844 Rush Street,
Chicago 11, Illinois,
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C. A. 7
CLERK

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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APPENDIX TO RESPONDENT'S BRIEF.

THE FIRST HEARING.

(Dec. 15, 1937.)

Appearances:

Albert M. Hartung, 230 Park Avenue, New York, New York, General Solicitor, Railway Express Agency, Inc.

Leo J. Hassenauer, Chicago, Illinois, Counsel for The Order of Railroad Telegraphers.

George R. Joslin, St. Louis, Missouri, Vice President of The Order of Railroad Telegraphers.

Leon L. Rice, Jr., Office of Chief Counsel, Interpretative Division, Bureau of Internal Revenue, Washington, D. C.

R. L. Cooper, Social Security Tax Unit, Bureau of Internal Revenue, Washington, D. C.

Horace A. Bacus, Research Director, representing Mr. George M. Harrison, President, Brotherhood of Railway and Steamship Clerks.

* * * * *

10 MR. PAUL GROSS, JR., a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hartung.

• • • • •

14 Q. We were also asked to furnish General Rules of the Railway Express Agency. Will you please identify this document?

A. I submit as Exhibit No. 8 a copy of "General Rules and Instructions" issued by the Railway Express Agency.

(A paper bound book of 96 pages, entitled on front cover "Railway Express Agency (Incorporated) General Rules and Instructions Railway Express Agency New York, January 1, 1936" was marked for identification "Ex. No. 8" and offered in evidence.)

Q. Please identify this document which is in four parts.

A. I submit as an exhibit consisting of four parts, Exhibit No. 9, a copy of General Rules and Instructions issued by the American Railway Express Company, bearing date New York, January 1, 1924; also Supplement No. 5, Supplement No. 6, and Supplement No. 7, issued as supplementary to the January General Rules and Instructions. I might call attention at this point that the fact that the supplements bear the name of the Railway Express Agency is because of the fact that the American Railway Ex-
15 press Company General Rules and Instructions were continued by the Railway Express Agency and these supplements were issued by the Railway Express Agency during the time in which it was in existence and were in effect until the Railway Express Agency issued the General Rules and Instructions embodied in this Exhibit No. 8.

• • • • •

16 Q. Will you please state the number of cities and towns in which the Railway Express Agency has representation and where the express rates are public?

A. The Railway Express Agency conducts its operations at 1,674 salary express agencies, that is, where the operations of the Express Agency are conducted by salaried employees exclusively. It has 16,769 joint railroad-express agencies. At the 16,769 joint railroad-express agencies 16,688 are allowed compensation on a commission basis, and at 81 of those agencies compensation is at a fixed allowance.

* * * * * *

32 *Recross Examination by Mr. Hassenauer.*

Q. Mr. Gross, approximately how many joint railway-express agents are there that are on a salary basis?

A. We have no joint railway-express agents that are on a salary basis. I testified that there were 81 of a total of 16,769 who were paid at fixed allowances. They are not in the category of a salaried agent.

* * * * *

35 Examiner Schoene: As to the "exclusive agents" there is no question that they are employees?

Mr. Hartung: They are employees and their compensation as to employees and deductions are made according to the taxing clause of the Carriers Act.

* * * *

MR. W. W. OWENS, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hartung.

* * * * *

39 Q. Do you know whether or not the railroad agents do generally engage in outside activities in various towns?

A. The railroad agent in a small town is not usually confined exclusively to representing the railroad company. He will be the agent of the express company, he will handle telegrams for the telegraph company, generally sell insurance policies for an insurance company, and may sell financial paper for the American Express Company. These activities, so far as I know, are all compensated for on a commission basis.

Q. And what is the relationship of those railroad agents to the express company?

A. Well, they are purely an independent contractor.

* * * * *

A. I will state in another way. The Agency makes th
best possible arrangement it can at all places where ther
is not sufficient business to justify the expense of an ex
clusive operation on a salary basis. Usually that is wit
the railroad agent. There is nothing compulsory abo
the railroad agent handling our business; many railro
agents refuse to handle express business. At such poin
where the volume of express business is so small that th
business could very easily be handled by one person,
the railroad agent will conduct the business we e
40 deavor to have him do so, for the reasons I have e
plained. If the railroad agent will not handle t
business, and it is of sufficient volume to justify our

deavoring to secure some other contractor on a commission basis, we endeavor to make that arrangement. There are many offices, as stated, where the railroad agent could conduct the joint operation, but where it is not done; for instance, Catlettsburg, Kentucky, I have in mind.

Q. Why wasn't that done there?

A. The express business is small at Catlettsburg and the railroad agent simply did not want to bother with it and would not handle it, but it did have enough business that we maintain a regular office there, therefore we have a salaried employee. Railroad offices frequently are closed, as an illustration, and if there is sufficient business in the community and the Railway Express Agency can obtain somebody else to handle its business as a contractor on a commission basis it endeavors to do so. I have in mind Versailles, Kentucky. The N. & W. Railroad closed its office at Versailles, and we arranged for a merchant to represent us because we thought express service was desired by that community and was of sufficient volume to justify making an arrangement with an independent contractor.

Q. Mr. Owens, at the places where the railroad agent acted as the agent of the express company does the express company exercise any jurisdiction over the hours of labor, the working conditions, the question of promotion or demotion, or with respect to anything of that kind?

A. No, it does not; the Express Agency has nothing whatever to do with the assignment of the railroad agent at that point, at any point where he may be employed. The first information we have of a change is when the railroad company notifies us that on a certain date a transfer of agents is to be made. We usually have a representative present at the time; the outgoing agent is checked out and the incoming agent is checked in; but we do not always do so, sometimes that can not be arranged. But we have nothing whatever to do with the assignment of that individual

to be the agent at the point where he goes. He obtains the position usually, I understand, by a bid on a bulletin put up by the railroad company advertising that a vacancy at a place will occur or in the case of the exercise of
41 seniority the transfer is made through what is generally known in transportation service as the "bumping" process; but the Express Agency has nothing to do with the assignment of such agents; cannot promote them, does not in any way discipline them or demote them; does not prescribe the hours or the working conditions or the salaries that the agent receives as the representative of the railroad company. The Express Agency does prescribe the rate of commission applicable to the office that may be involved.

Q. That is a matter of agreement between the agent and the Express Agency?

A. Correct; that is a matter of agreement between them.

Q. And, if I understand your testimony, if at station B on the 10th of the month the railroad company concludes to remove Mr. Jones and place that agency in charge of Mr. Smith, if the Express Agency desires to continue to have the railroad agent act as its agent it must accept the new agent appointed by the railroad company?

A. That is correct.

Q. If the Express Agency did not wish to exercise such right or privilege, what would it be necessary for the Express Agency to do?

A. It would have to find another independent contractor, or establish an exclusive salaried representative.

Mr. Hassenauer: I object to that statement. "It would have to find another independent contractor." That is another conclusion of the witness.

A. (Continuing.) That is not a conclusion; that is known by the actual facts.

Examiner Schoene: Let the record show that the Examiner feels that the statement "another independent contractor" is a conclusion of the witness.

Mr. Hartung: Let us have it show that when that occurs the Express Agency could make another arrangement, either by having its own office established or by entering into a contract with some other person.

A. (Continuing:) Yes, I recall a very definite case of that kind at Roanoke, Alabama.

Q. What was done there?

42 A. We employed or secured a contractor—my recollection is he was a merchant; he was in other business anyway—to represent our company, and he represented our company in Roanoke, Alabama.

Q. And this express work was merely an incident to his other business?

A. Merely additional to his other activity.

Q. And it was only a small part of his entire business?

A. And the income from the express business was very small to his total income.

* * * * *

Cross Examination by Mr. Hassenauer.

49 Q. Mr. Owens, I call your attention to Exhibit 1, Article XI, Section 1, and note in it this language: "The Express Company may arrange with the Rail Company for station and train employees of the Rail Company to act as agents and express messengers of the Express Company and to handle express at railroad stations, subject to the rules of the Express Company." I call your attention to that language, "subject to the rules of the Express Company." State whether or not the rules referred to there are the rules, the General Rules and Instructions of the Railway Express Agency previously introduced as Exhibit No. 8 in this proceeding?

A. Yes.

Q. Are there any other rules included in that provision other than those in Exhibit No. 8?

A. Yes. These and other general rules for the conduct of the express business. There are rules that define the prohibition laws of various states.

Q. Are there any rules that apply to joint railway sta tion agents?

A. Every law that applies to a common carrier by rail applies to the express agency, and where it is necessary to put that law into the possession of the company's agents, be they exclusive or contract, it has to be done.

* * * * *

Cross Examination by Mr. Bacus.

55 Q. There are some instances where the work is no turned over to the station agent, but you do turn i over to baggage-men or ticket clerks?

Mr. Hartung: Do you mean the station agent does tha or do you mean that the Express Agency does that?

A. There may be a few instances where a train goe through a station when the railroad agent is not on dut where the railroad agent will make an arrangement wit the porter to remove the express from the train, but th conducting of the agency is usually done by the railroa agent. There are some very few exceptions.

Q. Isn't it a matter of fact that the Railway Expre Agency, in line with the agreement, exercises complete di cretion in the selection of those individuals as Expre agents?

A. Most emphatically they do not; they have nothi whatever to do with when a railroad appoints as agent an whom we accept as the handling agent.

Q. If the work was being improperly handled, do I u derstand you to say that steps would be taken, possibly, to make a change in the personnel?

A. We would, of course, endeavor to have it properly handled—I referred to embezzlement—we would take the work away from him if the railroad company did not remove him.

Q. If you had an agent there who was positively inefficient and express shipments were not being handled carefully or in a proper manner, would the Railway Express Agency have authority to remove that individual and have someone else do the work?

A. We could get another contract agent.

Q. In other words, you have complete discretion in selection as well as with dismissal?

A. We do not. If we use a railroad agent we use the agent that the railroad employs. If he refuses to handle
56 the business we endeavor to make some other arrangement.

Q. If the work is not satisfactory?

A. Not necessarily. There are places where the work of the agent is not satisfactory, but he remains just the same.

* * * * *

57 Q. I would like you to explain further about the place in Kentucky—I do not recall the name of it—in which the the joint agent refused to render the service to the Express Agency.

A. He was not a joint agent.

Q. He was a railroad employee?

A. Yes.

Q. And he refused to act as joint agent?

A. That is right.

Q. What town was that?

A. Catlettsburg, Kentucky.

Q. And because he refused to be a joint agent there you have now a salaried employee instead?

A. That is right.

Q. What are his duties as a salaried employee?

A. His usual business, at this time of year, is usually to build a fire in the office.

Q. Would it be right to say that his duties are the same as those which would have been the duties of the joint agent?

A. No; the duties of the joint agent, the joint agent
58 does all of the work for the railroad company.

Q. But, so far as the Express Agency is concerned, it would be the same?

A. It would be.

Q. The man rendering service as joint agent would conduct the same business?

A. Yes, he would conduct the small amount of business that is handled at that office.

Q. Might I inquire if exclusive agents are bonded?

A. Not necessarily; some of them are and some are not. We do not as a rule bond employees with fidelity companies.

Q. Who gives orders to a joint agent; does the joint agent get his orders, with respect to service for the Express Agency, from the railroad or from the Express Agency?

A. That depends on what it is that is involved. The minutiae, the details, is with the Route Agent of the Express Agency.

Q. Would it be true to say that a railroad does not give the joint agent any orders pertaining to his service as a Railway Express agent?

A. I would not say that they give them no orders; they might; for instance, the train dispatcher might complain that the agent was not using sufficient diligence to get shipments on the train; or the train-master; or, in slang words, that he should get a move on him.

Q. That would be directing him to perform his duties as an express agent?

A. That is true.

Q. But so far as his duties as an express agent are concerned, he gets his direction from the Express Agency?

A. That is right.

* * * * *

EXHIBIT A.

72 Railway Express Agency
Incorporated

Law Department
230 Park Avenue
New York

September 3, 1937

Mr. Murray W. Latimer, Chairman,
Railroad Retirement Board,
Washington, D. C.

Dear Sir:

The Railroad Retirement Board has recently sent to the Railway Express Agency, Incorporated, a large number of the Board's Forms AA-2, requesting information respecting the amount of express commissions paid to applicants for annuities under the Railroad Retirement Act who formerly were in the employ of railroad companies and who acted as agents for the Railway Express Agency or its predecessor, the American Railway Express Company. In view of the considerable amount of labor involved in providing the requested information and the fact that the express commissions paid to such applicants can have no effect in determining the amount of the annuities to be granted them, it would seem that the Railway Express Agency properly should be relieved of the labor of furnishing the information.

These agents are not employes and the Railway Express Agency is not their employer within the provisions of the Railroad Retirement Act. Section 1 (b) and (c) of the Railroad Retirement Act in part provides:

> "(b) The term 'employee' means (1) any individual in the service of one or more employers for compensation, * * *.
>
> "(c) An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation."

Railway Express Agency has approximately 23,000 offices and at many of these offices the volume of express business is insufficient to justify the services of an employe and arrangements are made to have the express business 73 handled by an independent contractor; a local merchant, a drayman, or more frequently by the railroad agent. For such services rendered to the Express Agency these persons usually are compensated on a commission basis. The express business handled by such persons is merely incidental to their other business or occupation and at the majority of the agencies consists of the handling only of two or three express shipments a day and at many of them is limited to the handling of only a few shipments per month.

Those persons who serve as express agents who also are railroad agents are railroad employes, subject solely to the railroad company's continuing authority to supervise and direct the manner of the service which they shall render. They are hired by the railroad company and are subject only to the authority of the railroad company with respect to promotion, discipline and dismissal. They are not subject to selection by the Express Agency nor to the exercise by the Express Agency of the normal right to hire and fire, and they are not subject to any of the rules of the Express Agency with respect to hours of service or working conditions of employes, and never have been accepted by or considered as employes of the Express Agency. They have never been included in the various general increases and decreases in the wages of the employes of the Railway Express Agency, or its predecessor company, American Railway Express Company, and they have not been and are not included as employes in the reports of the Express Agency to the Interstate Commerce Commission.

Since the applicants in question are not employes of the Railway Express Agency it is assumed that the Railway Express Agency will not be obliged to complete Forms AA-2 with respect to commission payments, but if any other information be required or desired we shall be glad to have you so advise.

Yours truly,
(signed) A. M. Hartung

JCC/EP

EXHIBIT C.

77 Railway Express Agency

Law Department
230 Park Avenue
New York

October 20, 1937

Mr. Murray W. Latimer, Chairman,
Railroad Retirement Board,
Washington, D. C.

Dear Sir:

The efficient and economical conduct of the express business always has necessitated arrangements with individuals engaged in other fields of business to handle the very slight amount of business transacted in the smaller communities. The volume of business very frequently is insufficient to permit of engaging the services of even one employe either on a full or part time basis. Thus, Railway Express Agency maintains approximately 23,000 offices throughout the United States, and at more than 16,000 of those offices the amount of business in insufficient to justify it in maintaining a separate place of business or engaging an employe to carry on that business. To repeat a statement I made in my previous letter, in many of these offices not more than

two or three express shipments are received and delivered
in one month; at others there may be five, ten or twen-
78 ty shipments a month, and, of course, at some of them,
the volume is greater and daily shipments are handled.
It is true that there are instances where the volume of
traffic is substantial, and arrangements are made with various individuals, including railroad agents, to handle that business under contract, and to engage such assistance as they may require for that purpose. Sometimes three or four persons participate in the conduct of the business at such points, but none of those persons is an employe of the Express Agency. The independent contractor, who may carry on that business, may employ others to assist him either on a part time or full time basis; he may use his own vehicles, but he does so as an independent contractor and not as an employe of the Express Agency.

To revert again to the small offices, which constitute by far the greater percentage, it has been found expedient generally to endeavor to have the business handled at such points by the railroad agent, and under its contract with the railroad companies which is uniform, as to all of them, the railroad company permits the Express Agency to have the free use of the station and its facilities, which serve as an inducement to the Express Agency to arrange with the railroad agent to handle the express business. This arrangement is in the interest of economy, for the Express Agency otherwise would be required to own or rent other premises to carry on its business, or make other arrangements for the handling of that business. The experience and training of railroad agents in transportation matters also induce us to make such arrangements.

I note your reference to the provision of the Operating Agreement authorizing arrangements of this character and calling attention to the provision therein describing such persons as "joint employes". This incidental reference in the contract does not make such railroad agents employes of the Express Agency. Whether or not they are employes or independent contractors is dependent upon the actual situation, and the mere reference to such persons as employes would not and does not constitute them such. It is equally true that naming them independent contractors likewise would not create that relationship. The railroads and the Express Agency in contracting for the services of their respective agents were interested when making such arrangement in providing against liability for the acts of their respective agents and employes when such agents and employes were acting for the other. In a great many cases, particularly with reference to messengers, and baggagemen, such employes actually are joint employes, and, in the interest of brevity, and for the sake of convenience, the term "joint employe" has been used broadly and not for the purpose of defining the relationship of such persons to the Railroad Company or to the Express Agency.

It is stated in your letter that the Agency is free to discontinue the services of a joint agent at any time and "has all the disciplinary powers which this power entails". It is correct to say that the Agency may discontinue the
79 services of a joint agent, but in doing so it proceeds
by the termination or cancellation of a contractual arrangement and does not and may not discharge the agent. The railroad agent continues to be the railroad agent regardless of the action taken by the Express Agency. If the Express Agency chooses to terminate the arrangement it must, likewise, discontinue the handling of its business at the railroad station and establish its place of business elsewhere. To repeat, the Express Agency may not discharge the agent, and contrary to the view expressed by you, that it "has all the disciplinary powers which this power entails", it has no such authority. It may not discharge the man; it may not promote him; it may not demote him; it may not prescribe his hours of duty; it may not prescribe his working conditions, and to go back to the initiation of the arrangement, it may not select the individual; it must take the person who is the railroad agent if it desires to make a contract with him for the conduct of the express business.

Referring to another item in your letter, in which you call attention to the rules and regulations of the Company, particularly Nos. 818 to 865, an examination of those rules immediately will disclose that most of them are addressed specifically and apply only to employes of the Express Agency, and that the remaining rules, which relate to the conduct of the business with the public, apply to any person handling such business, whether he be an employe or an independent contractor. The Express Agency is subject to the provisions of the Interstate Commerce Act; it is under the most stringent regulation as to its rates, rules and practices, and to avoid any infraction of the statutory provisions it is extremely important that it provide very definite rules governing its relation to the public. A thorough study of the rules and regulations will disclose that there is no provision therein supporting the view that railroad agents, who serve also as express agents, are employes of the Express Agency rather than independent contractors.

80 We do not mean to suggest that the fact such agents are paid by commission affects the relationship. The Express Agency has in its employ some agents paid by commission who give their entire working time to the Express Agency. These men are employes and have been so treated by the Express Agency with respect to the Retirement Act, with respect to working conditions, and with respect to all matters pertaining to employes, including the right to hire and fire, the right to promote and demote, and the right to discipline in all respects afforded by the relationship of master and servant. We contend that only those agents whose express activities are incidental to their regular business or employment, who have agreed to perform certain services for the Express Agency for a stipulated consideration, and who have control of themselves and their helpers within reasonable limits as to the time of performance and the precise method of procedure to be followed in completing a task are independent contracts. To hold such agents as employees of the Express Agency is to prohibit the Express Agency from letting out to independent contractors its work at stations where as little as two shipments a day, and in some cases even less, are handled, which is impractical, and to our view not intended by Congress as we interpret the language of the act.

This matter is of much importance to us, and because thereof we should like, if possible, to confer with you upon the subject. Further, if ultimately you should still feel that these agents are employes, we desire that you issue a formal order so that we may obtain an adjudication of the status of these agents by the Federal Court as provided by Section 11 of Part 1 of the Retirement Act.

Yours very truly,

(signed) Albert M. Hartung.

EXHIBIT 1.

Standard Form of Agreement Between Railroads and Railway Express Agency, Effective March 1, 1929.

84 This Agreement, made as of March 1, 1929, between hereinafter called the "Rail Company", and the Railway Express Agency, Incorporated, a corporation of the State of Delaware, hereinafter referred to as the "Express Company", Witnesseth:—

86 Article II. Sec. 1. The Rail Company hereby constitutes and appoints the Express Company its exclusive agent (a) for the conduct and transaction of the express transportation business, including the off line auxiliary service (commonly known and referred to as pick-up and delivery), upon such passenger, express or mail trains of the Rail Company as may be agreed to, over the main lines, branches and extensions of all railroads now or hereafter, during the continuance of this agreement, owned or leased, and operated by the Rail Company, and (b) for the collection and disbursement and/or division under this agreement of all revenues accruing under this agreement; but nevertheless subject to the conditions and limitations in this agreement contained.

90 Article III. Sec. 5. The Rail Company agrees to stop its trains at stations where they are scheduled to stop in such a manner and for such time as will permit the Express Company by due diligence, and with sufficient force, to load on and to unload from trains all express matter carried or to be carried on such trains as will not unreasonably interfere with other business of the Rail Company, and, under like conditions, the Rail Company shall provide the Express Company, without compensation other than that provided in Articles IV and V, access to and from station platforms, trains and terminals, for its employes,

vehicles and other conveyances for the handling, loading and unloading of property or express matter carried or to be carried on trains of the Rail Company.

Article IV. Sec. 1. In cases where an employe of the Rail Company acts as agent for the Express Company, the Rail Company, to the extent that it reasonably can, shall allow the Express Company the use of a portion of the station buildings now existing or which may hereafter be erected, including appurtenances and conveniences, such as heat, light, and use of telephone at station, without charge to the Express Company, except as otherwise provided in Section 2 of this Article, provided that the Express Company shall pay any additional toll charge made by the Telephone Company.

102 Article VI. The Express Company shall as soon as practicable furnish adequate and suitable equipment, and shall use its vehicles, property, offices, and other facilities, and its agents and employees in operating an express transportation business as agent of the Rail Company; and in the conduct of said business shall exert itself in all proper ways to make said business satisfactory to the public and to the Rail Company.

105 Article XI. Sec. 1. The Express Company may arrange with the Rail Company for station and train employees of the Rail Company to act as agents and express messengers of the Express Company and to handle express at railroad stations, subject to the rules of the Express Company, and the Rail Company may arrange with the Express Company for the agents and express messengers and other employees of the Express Company to act as station or train employees of the Rail Company, subject to the rules of the Rail Company, upon such terms as may be agreed upon by the two companies.

107 Article XII. The Express Company shall load and unload express matter transported under this agreement, or require the shippers and consignees to do so.

Article XIII. All of the agents and employees of the Express Company while on the premises or on lines of the Rail Company, shall at all times conform to the general rules in force thereon, and in case any messenger or other employe on any said lines shall from any cause be objectionable to the Rail Company, he shall be removed or discharged upon the written request of the Rail Company or of the Rail Company's principal operating representative.

EXHIBIT 8.

General Rules and Instructions.

(1936 Edition.)

256

Notice to Employes.

The Rules, Instructions and Information contained herein are intended for the guidance and use of the Company's employes only. The business of the Company must be transacted strictly in accordance therewith.

Employes must make a thorough study of these Rules and Instructions. The plea of ignorance will not be accepted as excuse for mistakes made in transacting any part of the business.

These Rules and Instructions are based on the character of forms and the conditions which prevail at the majority of offices. At offices where the use of special forms of waybills, delivery sheets, etc., has been authorized, employes will be governed by the instructions issued in connection with such special forms.

Special instructions heretofore issued by circulars, unless superseded by rules laid down in this book, remain in force.

257 General Remarks.

The business of the Company is to forward by rapid conveyance, shipments of Merchandise, Perishable Freight, Live Stock, Live Animals, Jewelry, Bullion, Coin, Currency, Bonds, Valuable Papers, etc., and to deliver same promptly; to make collections with or without goods; to fill orders; to attend to commissions; and to sell and pay money orders, travelers' cheques, etc.

The express business being eminently one of detail, requires system, accuracy, diligence and courtesy from every one engaged in it, and above all, that the business of today be done before tomorrow. The Company's relations with its patrons must be treated as strictly confidential; those who entrust their business to it, do so with the belief that its service is safe and efficient. Each employe should put forth his best efforts to avoid causes of dissatisfaction to the public or loss to the Company, and to maintain the highest standard of express service. A satisfied patron is the company's best asset.

258 [Rule] 1. The unit of express operation is the local office or agency. The responsible official in charge of every express office is the agent, or in his absence the duly authorized acting agent.

311 [Rule] 794. The Company's General Rules and Instructions appearing in this book and Supplements thereto, also Operating Department General Circulars, must be faithfully and uniformly observed in transacting the Company's business.

[Extensive excerpts from Exhibit 8, the 1936 edition of the "General Rules and Instructions", were included in the Examiners' Reports and are printed in Petitioner's Appendix at pages 58-61, 62, 658-669, 732-3.]

BRIEF OF PETITIONER.

506 On cross examination, it was brought out that a joint-railroad-express agent was furnished the forms used in carrying on the express business and in making his periodical reports and, further, that he in transacting the express business was subject to the rules and regulations of the Express Agency, particularly the General Rules and Instructions (Exhibit 8, Rec., p. 10). (Rec., pp. 20, 21, 28, 29, 30, 43).

The Express Agency and all persons doing its busi-
ness, whether they be employees or independent con-
507 tractors, are required to use the uniform express re-
ceipt in effect and on file with the Interstate Commerce Commission. *Adams Express Co. v. Croninger*, 226 U. S. 491. For more than thirty years express companies have been subject to regulation by the Interstate Commerce Commission and State Commissions. Their rates for the most part have been fixed by the Commission: *Express Rates, Practices, Accounts and Revenues*, 24 I. C. C. 381; 28 I. C. C. 131; 35 I. C. C. 3; *Proposed Increase in Express Rates*, 50 I. C. C. 385; *In Re Increase in Express Rates*, 51 I. C. C. 263; *Express Rates, 1920*, 58 I. C. C. 281, 58 I. C. C. 707; *Express Rates, 1922*, 83 I. C. C. 606. The Official Express Classification, the Uniform Express Receipt, the waybills and labels, and the manner and method of presenting, marking, packing and delivering property for transportation by express, have been prescribed by the Commission; *Express Rates, Practices, Accounts and Revenues*, 24 I. C. C. 381; 28 I. C. C. 131; *Released Rates*, 43 I. C. C. 510. A uniform system of accounting also has been prescribed by the Commission for the express companies, as have been their depreciation charges; *Depreciation Charges of Express Companies*, 215 I. C. C. 629; and all the transportation services of the express companies, are subject wholly to the direction and regulation of the Commission, and the Commission repeatedly has exercised such jurisdiction.

PETITIONER'S ORAL ARGUMENT BEFORE THE EXAMINER.

(January 17, 1938.)

570 Mr. Hartung: * * * I think all present know from their own experience that in the smaller towns, over a long period of years, the railroad agent very frequently not only was the railroad agent and the express agent, not only did he send Western Union telegrams, but also he was, perhaps, the principal coal dealer of the town; very often he had three or four of these activities in addition to his railroad duties.

571 * * * Therefore, what is the difference between
the relation, the status, which the country storekeeper
572 or the drayman has and that which the railroad agent
has to the express company? They are required to perform exactly the same duties; they use exactly the same forms, they are required to make the same reports, they are compensated on the same basis.

575 The agent is told "When you receive a shipment you must use the uniform express receipts, because by the law that is the only kind which the company may issue." There are instructions as to the charges because under the law the express company is required to collect a definite fixed charge and no more and no less. The express company performs a C. O. D. service and these services, whether the employees are independent contractors, whether exclusive agents of the express company, or whether joint agents of the railroad and the express company, or merchants, or draymen, whether this shipment is received at one or the other of these places, the same rules are followed.

576 * * * There is no requirement that the agent perform that duty himself, that a joint railroad agent

shall continue that business himself, and as a matter of fact, commonly the agent does not do it himself but someone who works for him does a great deal of that work.

594 As to the testimony of Mr. Owens as to the express company being concerned as to whether the business was handled efficiently but not as to whether it was handled economically, that means merely this: If the employee 595 of an express company handled that business, the express company would be directly interested in the amount which it cost to handle that business. If the express company should have an employee at a station who said he needed three more men to help him rather than two more men, the express company would have to shoulder the difference between the salaries of two and three more men, but if the business is handled by a commission agent who secures his compensation by commission by a percentage of the express charges, then it does not make any difference to the express company whether he uses two men or three men or six men, because he pays the difference. The express company, however, like the man, is interested in the question of whether that business is handled efficiently. You would not make a contract with a man to handle some business for you if he did it in such a way as to displease your customers, and we insist upon our business being handled in such a way that the shipper will continue to use our business and not turn it over to a competitor.

The same form of application is taken from all persons whether they be railroad agents or draymen or store-keepers. I think Mr. Hassenauer's argument might be construed as indicating that there is some distinction, but there is no distinction: it is taken from all these people. As to a question you asked, Mr. Examiner, as to whether those arrangements are made often or to what extent, they are quite common and change from one

to another depending upon the business need. Mr. Owens
testified as to one place where the railroad agent did not
wish to handle the express business and the express com-
pany made an agreement with a local merchant, I think,
for the express business. Now that local merchant handles
that express business as a side-line just the same as
596 the railroad agent handles it as a side-line. He handles
it as an independent *contractor, just as the railroad*
agent handles it as an independent contractor. The rela-
tionship in every instance is the same, made in the same
way, subject to exactly the same requirements, whether
the man be a railroad agent, or a drayman or a store-
keeper; he must use the same form of receipt, collect the
same charges, make the same reports, receive the same
rate of commission. The checking of his accounts from
time to time is just the same as the railroad agent's; the
supervision, if you choose to call it that, is the same in
one case as another.

597 * * * but whether the arrangement is made with a
joint railroad agent or a drayman or a store-keeper,
all the conditions which exist are the same. Now that is
highly important and significant, because if you hold that
the railroad agent who serves also as an express agent, is
an employee of the express company within the meaning of
the Railroad Retirement Act, then you must hold likewise
that that drayman or that country store-keeper is an em-
ployee of the express company.

THE SECOND HEARING.

(August 5, 1938.)

MR. RALPH J. GREGORY, a witness produced by the Order of Railroad Telegraphers, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hassenauer.

717 My name is Ralph J. Gregory, 3252 Maple Avenue, Cicero, Illinois. I am joint agent for the Chicago, Burlington and Quincy Railroad and Railway Express Agency at Cicero. I have been handling express since August, 1928. I entered service in 1916, and was a tower man prior to August, 1928, when I bid in on the station job.

* * * * *

719 When I took over these duties as a joint railroad express agent the Railway Express Agency put me on a salary basis * * *. This continued until June, 1933, when I was taken off a salary basis and put on commission basis.

* * * * *

Q. At the time you were working on a salary basis, did you receive letters of instructions and circulars addressed to you as agent or commission agent at that station?

* * * * *

A. Yes.

Q. Since you were put on a commission basis were the reports you made to the Railway Express Agency checked over by the route agent?

A. The office is checked two or three times a year now, the same as it was when I was on a salary basis.

* * * * *

722 Q. You testified a moment ago that you had been receiving circular instructions from the Railway Express Agency during the period of time, Mr. Gregory, you were employed on a salary basis and also on a commission basis. I will now hand you Railroad Telegraphers' Exhibit marked number 1 for identification and ask you to identify this Exhibit.

A. I received that.

Q. Now, instead of reading the entire *Exhibit*, will you state briefly the instructions contained thereupon of which you took note.

• • • • •

Examiner Schoene: We will identify it as Exhibit No. 1-B.

• • • • •

A. Bulletin 61, dated January 26, 1937, consists of nine pages, signed by I. Longaker. My attention has been called on page three of the instructions to rule 355 of General Rules and Instructions with regard to Re-Marking and Waybilling shipments. In addition to that instruction 723 contained in the Bulletin, there were not less than fourteen specific items to which my attention was called for the purpose of conducting the express business.

• • • • •

A. In another circular dated February 26, 1937, also signed by Mr. Longaker, my attention was called to Rules 638, 639 and 650 of the General Rules and Instructions, more particularly with respect to the care and protection of money and valuables, and it pointed out more specifically that I give special attention to rules 610 to 650, inclusive, of the General Rules and Instructions.

• • • • •

A. In Bulletin 34, dated November 6, 1935, my attention was called to rule with regard to delivery of in bond shipments and to the fact that since the discontinuance of rule 787 of General Rules, I should carefully read rules 354 to 358 inclusive and in particular, rules 357 and 358. This bulletin consists of four pages and contains six additional instructions.

* * * * *

724 A. In the circular of instructions dated June 24, 1936, entitled "Handling Freight Values" my attention was called to Freight Value Rule 787 (new rule 715) calling attention to the fact that the Railway Express Agency had been experiencing substantial increases in claims paid for loss of liquor shipments and because of delay to shipments of films. The superintendent did not see why if the above instructions were carried out there should be any losses or delay.

* * * * *

A. In the circular of instructions dated December 17, 1934, also issued by the superintendent, my attention was called to the loss and damage in delivery of express shipments and in particular to carrying out rules 286 and 306 of the General Rules and Instructions and it further called my attention to reading carefully rules 286 to 358 inclusive of the same general rules.

* * * * *

A. In the instructions dated August 22, 1934, I was instructed, among other things, that in notifying shippers regarding express shipments destroyed in transit, instructions regarding such notification are contained in Item 4 of Operating Dept. General Circular No. 8 or in the event I did not have same, instructions would be found in rule 1513 in supplement No. 6 to General Rules and Instructions.

* * * * *

A. Instructions dated July 31, 1934. On page
725 three my attention was called to proper placing of
wrappers and shipments of baggage, and more spe-

cifically to Rule No. 48 of the General Rules and Instruc
tions.

* * * * *

727 A. Instructions dated October 3, 1934, also receive
from the Superintendent. I was instructed that Form
94 and 94-S must in all cases be submitted to the Assistan
Treasurer in duplicate.

* * * * *

728 A. In the Instructions dated September 27, 193
my attention was called among other subjects co
tained in that Instruction, to the new method of payin
C. O. D.'s and the private express statutes, and more pa
ticularly to familiarizing myself with rules 1075 to 10
of the General Rules and Instructions.

* * * * *

A. Instructions dated September 27, 1934, entitl
"Trustee Proceeds Served on the Company to Rea
C.O.D Proceeds". I was instructed that it was the utmo
importance that when money involved in C.O.D. tran
729 actions is attached, the Assistant Treasurer at Ne
York, as well as the Chicago office, must be notified
the quickest means possible.

* * * * *

A. In a circular dated April 1, 1937, entitled "Loss a
Damage Prevention Campaign", my attention was call
to a circular letter issued by Superintendent Longak
March 23, 1937, in which I was asked to prepare and se
in, without fail, a copy of every exception and inspecti
report made to my office, and the more I tell the Superi
tendent on the reports, the better results will be obtain
in the analysis.

* * * * *

Cross-Examination by Mr. Hartung.

734 I obtained the job as Cicero agent of the C. B. & Q. RR. in 1928 by bidding on the position when it was bulletined by the railroad. Being the senior applicant, I got the job. The agency was a joint agency with the express company, and the previous agent had been agent for the railroad and the express company. The bulletin advertised the position of agent for the railroad at Cicero.

* * * * *

734, When I became agent at Cicero, the route agent
735 turned the express business over to me for handling; that was a part of the position I went to. I was checked in by the route agent and the railroad. They were both there. It was a joint check. Each made his own check.

* * * * *

735, While I was on a salary basis I was paid out of the
736 station funds, accounting for it as the salary of agent, and I deducted the salary from the remittance due the express company. After 1933, when on a commission basis, my commission was also taken from the station funds at the rate of ten per cent. * * * I did not get a vacation.
737 While here at the hearing, I am being relieved on the job by an extra agent, a railroad man, who has worked the position before.

* * * * *

Redirect Examination by Mr. Hassenauer.

738 I had no difficulty arranging to be absent from work to come here.

Q. Did you ask any one connected with the Railway Express Agency?

A. I asked the railroad company.

Q. It is not necessary to ask any one connected with the Railway Express Agency?

A. They are informed by the railroad company that I am going to be off.

739 Q. That is your surmise, Mr. Gregory?

A. Yes, that is my surmise.

* * * * *

MR. CHARLES W. HAZEN, a witness produced by the Order of Railroad Telegraphers, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hassenauer.

739 My name is Charles W. Hazen, I am agent for the New York Central Railroad and also for the Railway Express Agency, at Madison, Ohio. I had been an agent at Saybrook, Ohio for 7 years, then at Unionville, Ohio, for 23½ years, then transferred from Unionville to Madison on July 15, 1937. I got the job at Madison because the agent there retired, the railroad published a
740 notice, and I bid on the job. * * * I handled express at Unionville until the agency there was discontinued June 1, 1936. * * * Commissions at Madison average $25 a month.

After bidding in the Madison agency I was compelled to fill out an application for employment and for fidelity bond, for the Railway Express Agency, just the same as any new employee. The application was presented to me, and the questions in it were put to me, by the Route
741 Agent. I signed the application. The same for the application for a fidelity bond. * * * The population of Madison is approximately 1,500 to 2,000. There is one train a day there, at 9:41 a.m., and all express going out and coming in is handled by that one train. An express company employee picks up and delivers in a truck. He receives four per cent commission for that service. My

only connection with that service is making out a voucher of the express business at Madison which is sent to the superintendent's office at Cleveland, and he is paid direct from the superintendent's office.

I have not been given authority by anyone connected with the Railway Express Company to appear here.

742 Q. You have heard the testimony of Mr. Gregory with respect to these circulars issued and which he received. Have you received similar instructions during the time you acted as agent for the Express Agency?

A. I received circulars from a different superintendent's office and part of them are identically the same. The others I would not be interested in.

Q. What is your practice upon receiving regulations and instructions that effect any change in the general rules?

A. Any general instruction is filed and all supplements are filed, or cancelled by the revised ones and filed with it.

Q. Do you have a book of general rules and instructions?

A. Yes. Any general instruction is in the book. A supplement goes with the general instructions, which are in book form.

Q. Do you ever have occasion to expose the general rules and instructions which are maintained by you for examination by the route agent.

A. Yes. The route agent checks those.

Q. How many times does he call at your office for examination of your accounts?

A. Probably twice a year. It might happen three times a year.

Cross-Examination by Mr. Hartung.

* * * * *

743 The express agency at Unionville was abolished because the trains did not stop there. My bid for the job at Madison was made to the railroad's Chief Dispatcher.

Q. As I understand, you testified there is one train a day at Madison on which express is transported?

A. That arrives at 9:41 in the morning. Yes.

Q. How long do you consume in looking after the express at that time?

A. I am there eight hours a day until five in the afternoon as railroad agent and express agent.

Q. I want to know how much time you spend in handling express business?

A. Eight hours a day.

Q. How much time do you actually work handling express?

Mr. Hassenauer: He has answered that question, Mr. Examiner.

Examiner Schoene: I think it is fairly apparent that the witness cannot spend eight hours in the same day working for both the express company and the railroad company; therefore, he should be more explicit as to the time devoted to one service or the other.

Q. What do you do for the express company?

A. I do all that is required to take care of the business.
Some days I receive three shipments a day, some days
fifteen. They all come on the same train. There are
744 separate cars for express and for baggage, and I load
and unload baggage and express. The length of the
train stop depends on how much baggage and express
there is. Sometimes it is only a couple of minutes, sometimes five. After the train leaves I put the express in the

express room, which is really the baggage room. I don't often move it in on a truck; I take it off the truck outside of the door and put it in. The delivery man has a small area in the business section of town which is, I might say, two blocks. It is a country town. He delivers in that area and picks up. Anything outside of that, they come get it.

The amount of compensation I get from the express company is regulated by the revenue on those shipments. You might have one shipment on which the charges are thirty-five cents or you might have one that would be fourteen or fifteen dollars. The average charge on express shipments is about $1.10 to $1.20. Perhaps at times it would be a little more.

745 I am supposed to handle the mail from that train but I don't always do it. I have a man carry the mail part of the time. He puts the mail on the train and takes it off.

Q. Did you get permission to be here today?

A. Yes, from the Chief Dispatcher of the New York Central Railroad Company.

Q. Is he the person to whom you apply when you want leave of absence or to whom you report?

A. Either to him or to the superintendent.

Q. That has been true at Madison, Unionville and Saybrook, is that right?

A. I never have left the office yet without permission from the railroad official in charge.

Redirect Examination by Mr. Hassenauer.

I am available to handle express business at Madison 8 hours a day, and I am also available to handle railroad business during that time. And at Unionville, after ceasing to handle express business, I continued to handle the railroad business 8 hours a day.

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Recross Examination by Mr. Schreiber.

746 Whenever I want to leave the service temporarily, say to take off a day, the railroad company makes the arrangements for a substitute. The railroad has a relief agent. I advise the railroad and it makes the arrangements for a substitute. There is no one else representing the Express Agency on the premises.

747 Q. Is there anyone representing the Express Agency to whom you could address yourself if you wish to be relieved from service—that is, is there anyone there in connection with your work to whom you could address yourself if you wish to be relieved from the services?

A. No.

Q. Do you know whether there is an arrangement with the Express Agency and the railroad whereby the railroad arranges for someone to substitute for you when you leave the service temporarily?

A. No.

Q. All you know is that you advise the railroad and they arrange for someone to take your place?

A. Yes.

By Examiner Schoene:

Q. When you transferred from Saybrook to Unionville I understood you to say you did not fill out an applicatio for employment and fidelity bond with the Railway Express Agency?

A. That is correct.

Q. You were checked in, however? By the railroad an the express company?

A. Yes.

• • • • •

MR. GEORGE E. JOSLIN, a witness introduced by the Order of Railroad Telegraphers, having been first duly sworn, was examined and testified as folows:

748 *Direct Examination by Mr. Hassenauer.*

749 My name is George E. Joslin. I am Acting Vice President of the Order of Railroad Telegraphers. I testified previously in this case. My duties are those which are especially assigned to me by Mr. E. J. Manion, President, and I have been placed in full charge of those matters affecting joint railway express agents.

Upon being notified that there was to be a rehearing, I addressed a letter to several General Chairmen in the various departments of the territory in which the Railway Express Agency operates, requesting them to report to my office in St. Louis all of the information which my
750 letter requested them to obtain. * * * In addition, I
personally interviewed several of the joint railway express agents in Indiana, Illinois, Ohio and Missouri. I discovered that they had been receiving orders practically identical with those which other joint railway express agents had received, and that the Railway Express Agency's method of instructing the joint railway express agents was more or less uniform.

* * * * *

Q. You have heard the testimony of Mr. Gregory and Mr. Hazen. State whether or not the testimony which they introduced regarding the instructions received from the Railway Express Agency is identical with that which you received from the General Chairmen in answer to your letter previously referred to?

A. Yes, it is and in addition thereto the General Chairmen obtained from the various joint railway express agents, additional instructions similar in scope providing that

751 the express agency has control and direction not only of the work and performance and its results, but of its detail and method and which additional instructions I will introduce as Exhibits.

Q. Mr. Joslin, I hand you Exhibit No. 2-B for identification.

A. I will identify this document as The Order of Railroad Telegraphers' Exhibit 2-B, consisting of approximately fifteen pages which is made up of circular instructions received by the joint railway express agents from the various superintendents, and other executive officers and officials of that company.

* * * * *

Examiner Schoene: Received in evidence as Exhibit No. 2-B. (Order of Railroad Telegraphers Employees' Exhibit No. 2-B, consisting of the following (19 pages), received in evidence:

Circular No. 89, addressed to All Agents, dated July 3, 1936, signed E. E. Honn, Superintendent.

Letter addressed to all Commission Agents, Subject: Revised forms May, 1935, Reports, dated May 28, 1935, signed W. S. McNutt, District Accountant.

Circular No. 121, addressed to All Agents, dated December 30, 1937, signed W. W. Argabrite, Superintendent.

Letter addressed to Agents at 17 towns, dated December 24, 1937, signed W. W. Argabrite, Superintendent.

Letter addressed to Agents at 17 towns, dated December 24, 1937, signed W. W. Argabrite, Superintendent.

Letter addressed to Agents at 5 towns, dated January 28, 1938, signed by C. I. Fitzgerald, Superintendent.

Circular No. 72, addressed to Agents at Commission Offices, dated April 27, 1935, signed by W. E. Carpenter, Superintendent.

Circular No. 13, addressed to All Agents, dated January 28, 1936, signed by W. E. Carpenter, Superintendent.

752 Circular No. 123, addressed to All Agents, dated September 30, 1937, signed by W. E. Carpenter, Superintendent.

Joint Supts' Circular #36 All Agents, signed by five Superintendents, dated March 23, 1938.

Circular No. 5, addressed to All Agents, signed by C. I. Fitzgerald, Superintendent, dated January 21, 1938.

Letter to All Agents, dated December 10, 1937, signed by V. R. Burton, Superintendent.

Letter to All Agents and Messengers, dated December 1, 1937, signed by V. R. Burton, Superintendent (2 pages).

Letter to All Agents and Messengers, dated December 10, 1937, signed by V. R. Burton, Superintendent.

Letter to Mr. Commission Agent, dated February 27, 1935, signed by W. J. Martindale, Traffic Agent (4 pages).

• • • • •

779 In 1924 a dispute arose between the Order of Railroad Telegraphers and the Chicago and North Western Railroad Company. The dispute concerned instructions given certain joint agents by the American Railway Express Company to meet trains carrying express after the railroad station had closed for the day. After a conference, Mr. Walliser, the railroad's Superintendent, wrote Mr. Boyington, the union's General Chairman, a letter dated May 2, 1924, in which he said, in part:

780 "* * * Agents handling express on a commission basis or otherwise are joint employes with the American Railway Express Company and as such are subject to American Railway Express Company's rules and regulations and compliance with special instructions issued by the Express Company's officers. * * *"

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EXHIBIT 1-A.

796

Railway Express Agency
Incorporated

Statement showing the number of Merchant Agents, who serve the railroads and Express Agency, receiving varying amounts of commission for the month of March, 1937:

Amount of Commission			Number of Offices	Percentage of Total No. of Offices	Accumulated Percentage
$1.00 and under			147	37.98	37.98
Over $	1.00 not over	$ 2.00	82	21.19	59.17
Over	2.00 not over	3.00	42	10.85	70.02
Over	3.00 not over	4.00	25	06.46	76.48
Over	4.00 not over	5.00	15	03.88	80.36
Over	5.00 not over	6.00	11	02.84	83.20
Over	6.00 not over	7.00	13	03.36	86.56
Over	7.00 not over	7.50	9	02.33	88.89
Over	7.50 not over	8.00	4	01.03	89.92
Over	8.00 not over	9.00	7	01.81	91.73
Over	9.00 not over	10.00	4	01.03	92.76
Over	10.00 not over	25.00	11	02.84	95.60
Over	25.00 not over	50.00	6	01.55	97.15
Over	50.00 not over	100.00	8	02.07	99.22
Over	100.00 not over	150.00	1	00.26	99.48
Over	150.00 not over	250.00	0	—	99.48
Over	250.00		2	00.52	100.00
Total			387	100.00	

EXHIBIT 3-A.

799

Railway Express Agency
Incorporated

Statement showing the number of Express Merchant Agents, who do not serve railroads, receiving varying amounts of commission for the month of March, 1937:

Amount of Commission		Number of Offices	Percentage of Total No. of Offices	Accumulated Percentage
$1.00 and under		163	15.07	15.07
Over $ 1.00 not over	$ 2.00	98	09.06	24.13
Over 2.00 not over	3.00	76	07.02	31.15
Over 3.00 not over	4.00	55	05.08	36.23
Over 4.00 not over	5.00	59	05.45	41.68
Over 5.00 not over	6.00	45	04.16	45.84
Over 6.00 not over	7.00	34	03.14	48.98
Over 7.00 not over	7.50	14	01.29	50.27
Over 7.50 not over	8.00	18	01.66	51.93
Over 8.00 not over	9.00	21	01.94	53.87
Over 9.00 not over	10.00	24	02.22	56.09
Over 10.00 not over	25.00	167	15.44	71.53
Over 25.00 not over	50.00	104	09.61	81.14
Over 50.00 not over	100.00	109	10.07	91.21
Over 100.00 not over	150.00	45	04.16	95.37
Over 150.00 not over	250.00	35	03.24	98.61
Over 250.00		15	01.39	100.00
Total		1,082	100.00	

EXHIBIT 1-B.

(Part 1.)

812 Railway Express Agency
(Incorporated)

Chicago, Ill., January 26, 1937.

Bulletin No. 61.

All Agents:

813 Preservation of Original Marks on Returned Shipments.

Complaints have been received from shippers because of complete obliteration of original marks on express shipments returned to them. Very often, destination Agent when returning such shipments, pastes the waybill or labels immediately over the original shipping marks with the result, the original shipper is unable to identify the shipment when it is returned.

814 Rule 355 of General Rules and Instructions reads:

> "355. *Re-Marking and Waybilling:* Shipments returned or reforwarded should be addressed with reforwarding label, Form 820, completely filled out, leaving the original address and labels crossed off but not entirely erased. Each shipment should be weighed at time of re-billing."

It is necessary all concerned observe instructions in above quoted rule when returning shipments to original shipper. Under no circumstances must waybills or labels be passed over original marks.

Exhibit 1-B.

Lost or Stolen Financial Paper.

The following Domestic Money Orders have either been lost or stolen from our Faxon, Oklahoma office:

AA-7132246 to 59 Inclusive

On January 3, 1937 the express office at Washington, N. C. was burglarized by unkown parties and blank money orders Nos. 6139077 to 6139079, inclusive of $50.00 denominations, were stolen.

Please be on the lookout for this paper and notify banks, hotels, merchants and garages and anyone else to whom it might likely be presented.

If the paper is presented, payment should be refused, paper taken up and if necessary, receipt given for same, except when presented by a bank, then write the words "Payment Stopped" across face of paper and return to bank unpaid. Persons who present such paper should be kept under surveillance and this office promptly advised, using telegraph or telephone when necessary.

815 Liquor Regulations—State of Florida.

A local option election was recently held in Union County, Florida, and as a result the points in that County are now in "wet" territory. The following express agencies should therefore be eliminated from Paragraph 6, Page 5 of General Circular No. 11-E, pending publication of an early supplement:

Dukes
Lake Butler
Raiford
Worthington Springs

Liquor Laws—State of South Carolina.

The following instructions should be substituted for those now appearing under South Carolina on Page 11 of General Circular No. 11E—

1. Alcoholic Liquor means any spiritous, malt, vinous, fermented, brewed, or other liquors (except as shown in Paragraph 2).

2. Beer, Ale, Porter, and all other similar malt or fermented beverages containing not more than 5% of alcohol by weight and all domestic wine containing not more than 14% by weight and not considered intoxicatin and may be transported into and within South Carolina in accordance with provisions of the General Instruction in Section 2.

3. Intoxicating Liquors may not be shipped into Sout Carolina from outside the state except when consigne to a wholesale dealer licensed under the South Carolina Tax Commission.

4. When the transportation is wholly within the Stat of South Carolina shipments may be made:—

(A) From a manufacturer to a wholesaler;

(B) From a Wholesaler to a Retailer;

(C) From a Retailer to a private person when th shipment is picked up by the carrier from the Re tailer's place of business and is not shipped C. O. I

(D) It is lawful for a private person to shi alcholic liquors intrastate in South Carolina whe such liquors have affixed thereto the required Sout Carolina stamp.

816 5. Although shipments of liquor consigned to a pr vate person may not move intrastate in South Carolin as a C. O. D. shipment, nevertheless, a shipment from manufacturer to a wholesaler or from a wholesaler to a r tailer may be made C. O. D. when the movement is whol within the State.

Loss and Damage—Abolishing of Freight Value Rules.

As a result of the change in instructions regarding handling of freight values, not only are a greater number of these shipments lost in transit, but also, under the new plan, they are being so handled as to result in a considerable increase in damage.

Statement prepared by the Accounting Department showing claims paid in October, 1936, on shipments classified as "Freight Values" prior to the revision of Rule 787 of General Rules and Instructions, presents for serious consideration the following outstanding figures:

	Loss	Damage	Misc.	Total	Inc. over Oct. 1935
Liquor	$ 248.00	$ 330.01	$ 6.47	$ 584.48	$ 106.32
Raw Furs	90.42	22.45	2.10	114.97	40.42
Small Arms	522.65	135.60		658.25	474.82
X-Ray Tubes		1192.19		1192.19	873.14
Misc.-Value over $5.00 per lb. and over $100.00	3377.64	2764.84	75.59	6218.07	3665.83

It is difficult to understand why these shipments, particularly X-Ray tubes are not being handled as carefully as they were when a hand to hand receipt was taken for them. The containers are plainly marked to show contents.

Just because a shipment is not handled under receipt should not prevent its receiving such care and attention as is warranted by the nature or value of it, and it does not seem reasonable that these shipments should receive rough or improper handling because we are not able to establish, by record, the name of the employe handling. All concerned must be instructed to handle shipments formerly classified as freight values in such manner as to eliminate the possibility of their becoming lost or damaged.

817 **Complaint of the Supreme Instruments Corp., Greenwood, Miss.**

In Bulletin No. 60 dated December 18, 1936, attention was called to difficulties experienced in the handling of shipments from the Supreme Instruments Corp., Greenwood, Miss. because of failure of Agents to comply with instructions surrounding the execution of their conditional sales contract.

Further serious complaint has been made, and unless there is immediate improvement in our handling and complying with shipper's instructions, we will lose all their business. In fact, some of it has already been taken from us.

818 Shipper states they have always had considerable difficulty with our offices all over the country in the handling of their contract shipments, and for the past few months the service, instead of improving, has become worse—so bad in fact, they have decided to discontinue further shipments to our offices who are the worst offenders.

Regardless of all instructions that have been issued, our people mishandle about 25% of these shipments. Apparently shipments are permitted to get into the hands of the deliveryman without sufficient information or i they have sufficient information, they disregard what should be very plain instructions.

Of one thousand shipments recently forwarded in our service, 25% or 250 of this thousand have been improperly handled in some manner.

The following is quoted from letter written by our Superintendent at Memphis, Tenn. who enumerates the principal trouble to be as follows:

1st—contract not executed.

2nd—when executed, improperly signed. The contract plainly stipulates that it must have the genuine signature of the consignee. Our deliverymen will accept the signature of a servant or most anyone, being willing to accept on the sales contract the signature of most anyone whose signature they would accept for the delivery of an ordinary express shipment. This, of course, makes necessary the return and further handling of each such improperly executed contracts.

3rd—contract returned by the consignee direct to the shipper, and this is the most prolific source of trouble. Our deliverymen will have the contract signed and leave it with the consignee to do as he pleases about it. Consignee may return it by U. S. Mail some time, or may not return it at all. It is hard to understand why any deliveryman with sufficient instructions and intelligence to deliver our traffic would not take this properly executed contract and settle it with his day's business and receive the proper 35¢ charge for the return of the instrument, and it is further hard to understand why our settlement people will allow this kind of settlement to be made without some inquiry or checkup as to why the contract is not returned.

819 4th—the contract is improperly executed in that it is not witnessed or dated.

5th—there are a large number of these contracts that are never returned, wholly lost, and we can find no record of them, entailing correspondence concerning them.

6th—each contract forwarded plainly requires the service charge to be paid by the consignee. In too many cases the charge is not collected; we promptly refund to the Supreme Instruments Corp., charge back to the delivering office and they then go out and collect from the receiver, who promptly deducts from the Supreme Instrument Corp. and starts a line of correspondence and complaint.

There are moving now some 100 to 150 of these shipments daily, and our revenue is running between $1,500.00 and $2,000.00 a month and this is a business that we can well afford to take care of.

The instructions which accompany these shipments are very explicit and it is important they be followed to the letter. Agents receiving any such shipments must carefully read and understand shippers instructions before attempting to make delivery. Wherever possible to do so, the consignee should be called on the telephone before shipment is sent out for delivery to make sure that he or the person who is to personally sign the contract is at the address shown.

Shipments of Radioactive Minerals Radium, Thorium, or any other Radioactive Substance, or any Materials containing Radioactive Substances, such as Powders, Containing Radium or Thorium, Liquids Containing Radium Emanation, Radium Salts, Radioactive Minerals, or any Radioactive Material Whatever.

Express service is now being used to a great extent for the transportation of radioactive substances. These materials are shipped in lead containers which, it is understood, are sufficient to protect the individual from any harmful effects, but not sufficient to prevent so-called fogging of sensitized photographic, moving picture or X-Ray film.

820 In handling this traffic the following procedure should be followed:

Shippers should be required to conspicuously label shipments in such manner that employes handling may readily observe the nature of contents.

Agency and train employes, including Baggage Master, Messengers, should be made fully aware of the need of keeping such shipments separate and apart from all other traffic and should not load such shipments in cars, on station, warehouse or motor trucks, nor in platform assortments within 10 feet of any shipment of Undeveloped photographic, moving picture or X-Ray film.

In handling it would be well for employes to pass word, man to man, of the nature of such shipments in order that they may be handled as outlined.

These emergency shipments Must Be Handled Without Delay.

I. Longaker,
Supt. of Agencies.

EXHIBIT 1-B.

(Part 2.)

822 Railway Express Agency, Inc.
Chicago, Illinois

All Agents: February 26, 1937.

Care and Protection of Money and Valuables.

The care and protection of money and valuables is a very important part of our duties and I wish to bring to your attention, the necessity of surrounding our operations in connection with their handling to insure the greatest possible secrecy.

Of utmost importance are Rules 638, 639 and 650 of our General Rules and Instructions, which I am quoting for your ready reference:

> "638. Packages of money, jewelry, etc., not exceeding $2000.00 passing between the city office and depot, may be handled in safes unaccompanied by a guard,

> but packages of greater value should be accompanied by a reliable employe as guard, in addition to driver.
>
> "639. In delivering currency, securities, jewelry, etc., valued at $2000.00 or more, a reliable employe to act as guard must accompany the money deliveryman to place of delivery.
>
> "650. When but one man is employed on vehicle, he must keep all valuable parcels locked in truck or safe furnished for that purpose."

You will please give special attention to rules 610 to 650 inclusive, and see that interested employes are familiar with these instructions and comply with same; and in fact, it is absolutely necessary that you comply with all instructions applying to the care of money and valuables in general.

At points where we are handling currency and coin for banks it is my understanding you have arranged with local police authorities to guard such shipments until delivery is effected. If there is any point where such guard service is not rendered, please advise me immediately.

Kindly acknowledge receipt of these instructions.

I. Longaker,
Supt. of Agencies.

EXHIBIT 1-B.

(Part 3.)

823

Railway Express Agency
Chicago, Illinois

November 6, 1935.

Bulletin No. 34.
All Agents:

Delivery of In Bond Shipments.

Since the discontinuance of Rule 787 which provided for the handling of certain classes of shipments under signature, there is the possibility of an occasional shipment moving "In Bond" going through to destination office without first having been delivered to the Collector of Customs for clearance.

You should carefuly read Rules 354 to 358, inclusive, of the General Rules and Instructions, and in particular, Rules 357 and 358, the latter dealing with delivery at destination office.

In the event an "In Bond" shipment should reach you without the "In Bond" label having been cancelled or a "Cleared Customs Label," Form 782 affixed, you should withhold delivery until you can ascertain whether shipment has been cleared. Under no circumstances, must delivery be made until such information has been obtained as the Agency is subject to a heavy fine when delivery is made to consignee before shipment is released by the Collector of Customs and all customs duties and charges paid.

Any "In Bond" shipments received without evidence of having been cleared through the Collector of Customs should immediately be called to the attention of Mr. E. S. Buckmaster, General Agent, Chicago, who will arrange for necessary handling.

Game and Fish Laws, Illinois.

The Game and Fish Laws of Illinois have been revised, effective as of July 1, 1935.

Of great importance to express employes is Section 36 of the Game Code, dealing with permits for shipment of Game, which is as follows:

824 Sec. 36. (Permits for Shipment of Game) Permits for the shipment of game to the holder of a hunting license will be issued by the Department, upon the receipt of an executed and sworn application, stating the name of the applicant, his or her age, occupation, place of residence, hunting license number, and that the game to be shipped shall be consigned by and to the applicant at one destination only, and that the same shall not be shipped for commercial purposes.

Any person making false statements in an application for a shipping permit shall be deemed guilty of perjury and punished accordingly.

The holder of such a permit may offer for shipment and have transported, not to exceed three separate shipments of game during the period of time covered by his hunting license. Such shipments shall not be made oftener than once in four days, and no one shipment shall exceed the possession bag limit.

Provided, however, that the holder of such a permit may offer for shipment and have transported not to exceed six separate shipments of water fowl during the period of time covered by his hunting license. Each shipment shall not be made oftener than one in two days, and no one shipment shall contain more than ten ducks, four brants and geese.

Upon offering game for shipment, the permit shall be presented to the agent of the transportation company, who shall endorse in ink thereon the name of the station from which shipment is made, the destination which much correspond with the address of the holder of the permit stated therein, the date of the shipment, the number of each variety of game contained therein and the agent's signature.

If a permit presented with a consignment of game for shipment shows by endorsements thereon that the number of shipments permitted has already been made thereunder, it shall be unlawful for any transportation company, common carrier or agent or employee thereof to accept the consignment proffered for shipment.

825 Shipments of game birds and animals under such a permit shall be open to inspection and shall have firmly attached thereto a tag upon which shall be stated the name of the consignor (who, under the provisions hereof, is also the consignee), the destination, the number of the permit, the number of the hunting license and the quantity of each variety of game contained in the shipment.

The tag referred to in the above preceding paragraph must be secured by the holder of the hunting license, by making application to the Department of Conservation, and it is our understanding that six tags will be sent him.

Improper Marking of Express Shipments.

Attention has been called to the fact that some shippers are using second-hand cartons on which they are not placing the name and address of consignee, but on the other hand simply writing the same on a piece of cardboard, and placing this cardboard under the string of the package. In the event the cardboard slips out from underneath the string that shipment no doubt would find its way to some former consignee, without the Company being able to determine where it had gone. Furthermore, such marking would aid a dishonest employee to remove the cardboard and substitute one on which he had written the name and address of some confederate.

Shipments addressed in such manner must be refused.

826 Lost or Stolen Financial Paper—Robbery of American Express Co.'s Collector at Kansas City, Mo., February 2nd, 1935.

In robbery of collector as above described, 360 money orders were taken, as follows:

Z-3331960 to 3332139
Z-8140460 to 8140639

We are advised that some of these money orders are being cashed in and around Tulsa, Okla., regardless of the fact they were advertised as lost or stolen in Financial Bulletin No. 188 dated April 1, 1935.

Please be on the lookout for this paper and notify banks, hotels, merchants and garages and anyone else to whom it might likely be presented. If paper is presented, payment should be refused, paper taken up and if necessary, receipt give for same, except when presented by a bank, then write the words "Payment Stopped" across face of paper and return to bank unpaid. Persons who present such paper should be kept under surveillance, and this office promptly advised by telephone.

I. Longaker,
Supt. of Agencies.

828

EXHIBIT 1-B.

(Part 4.)

Railway Express Agency
(Incorporated)

Chicago, Ill., June 24, 1936.

All Agents:

Handling Freight Values.

Freight Value Rule 787 (new rule 715) Operating Department General Circular No. 18 dated October 1, 1935, reads in part as follows:

> "Receipts will no longer be required for the following classes of shipments, but insofar as it can consistently be done, all such shipments should be given special attention by segregating them from ordinary freight and handling them in messenger cars:
>
> Films, Sound Discs or Talkies
> High Explosives (Samples)
> Liquor
> Shipments In Bond
> X-Ray Tubes
>
> Conditions will not always permit of the handling of these shipments in messenger cars, but wherever possible they should be so loaded."

We have been experiencing substantial increases in claims paid for loss of liquor shipments, and because of delay to shipments of films. With the revision of the freight value rule, it is understood that such shipments as those mentioned were to be given special attention and special handling in order to insure safe handling and to prevent delays.

We do not see why, if these instructions are carried out, there should be any losses or any delays.

It is important that such shipments, as well as all others which formerly were handled under hand-to-hand receipt, be so handled as to avoid losses and delays.

I. Longaker,
Supt. of Agencies.

EXHIBIT 1-B.

(Part 5.)

829

Railway Express Agency
Incorporated

Chicago, December 17, 1934

All Employes:

Loss and Damage
Delivery of Express Shipments.

Our losses, because of improper deliveries or failure to secure proper signature at time of delivery, are unnecessary. I have just had called to my attention within the past few days several instances where employes in this Division have accepted receipts which consignees deny, and due to inability to produce sufficient evidence that proper delivery has been made it has been necessary to make payment of these claims. In two particular instances, the receipt appearing on delivery sheets does not represent the name of consignee nor can it, in any way, be connected with the firm or person to whom shipment was addressed.

Rule 286 of the General Rules and Instructions reads:—

> "The delivery sheet, properly signed, is the company's evidence of contract completed. Entries on the delivery sheet must identify the shipment delivered and the signatures obtained thereon must be that of the consignee or his proper representative."

Rule 306, in part, reads:

> "The law requires at the hands of the carrier absolute certainty that the person to whom the delivery is made is in fact the person to whom the goods have been consigned."

I would suggest that all deliverymen, as well as any other employes who are called upon to make delivery of express shipments carefully read Rules 286 to 358, inclusive, of the General Rules and Instructions that they may be fully informed as to the requirements for making deliveries which, when followed, will eliminate these claims.

While it is necessary these instructions be strictly adhered to at all times, I desire to issue a word of caution
that employes exercise great care in making deliveries
830 during the Holiday Season. All will be extremely busy
and considerably rushed for time, but we must combine safety with speed and when making deliveries be sure shipments are delivered to consignee as addressed, and that his signature or that of his authorized representative is secured, which must be legible. If someone signs for consignee, that person must be required to also place his name on the delivery sheet, for example: John Jones by William Smith.

In this connection, I wish to remind all employes receipting for shipments of the necessity of comparing marks on the shipments with the information appearing on the receipt in such instances where shipper has prepared the receipt.

There is no excuse for failure to follow instructions appearing in our Book of Rules and we shall insist that all employes must comply with them.

I. Longaker,
Supt. of Agencies.

831 Railway Express Agency
(Incorporated)

Chicago, Ill., Aug. 22nd, 1934.

All Agents:—

Subject: Form 571—Notice of Matter on Hand Where Consignee Is Unknown or Cannot Be Located.

In order to do everything possible in reducing Loss and Damage, we direct your attention to Rule 395 of the Book of Rules and Instructions, which provides that when consignee is unknown or cannot be located, Agent must, within 15 days, issue Form 571. It has been found many Agents are not complying with these instructions. Where there has been any failure on your part to do so, please see that this form is made use of in accordance with the Rule referred to herein.

Subject: Returns On C.O.D. Shipments.

In order to retain our present business and develop all additional traffic possible, it is necessary any complaints received be given necessary attention.

We are particularly interested in complaints filed in connection with our new plan of returning paid C.O.D.'s and whenever you receive any complaint regarding same, I want to be immediately advised with such details as you are able to state and inform me what was the result.

833 Subject: Notifying Shippers Regarding Express Shipments Destroyed in Transit.

From time to time complaints are received from shippers of failure to receive notice of shipment which was destroyed while in transit.

Instructions regarding such notification are contained in Item 4 of Operating Dept. General Circular No. 8, or in the event you do not have same, they will be found in Rule 1513 in Supplement No. 6 to General Rules and Instructions, as follows:

"Notifying Shippers Regarding Shipments Destroyed in Transit.

1513—Where shipments are destroyed in fires, wrecks or otherwise, and the identity of the shipment or shipper can be determined, the shipper should be promptly informed so that he may adjust the matter with his customer and possibly arrange for duplicate shipment."

In addition, Exception Report, Form 650, should be sent to Agent at point of origin that he can notify shipper.

I. Longaker,
Supt. of Agencies.

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EXHIBIT 1-B.

(Part 7.)

835

Railway Express Agency
(Incorporated)

Chicago, Ill., July 31st, 1934.

All Agents:

Subject: Postal Notices to the International Shoe Co. St. Louis, Mo. Covering Undelivered Shipments.

We made mention of above in our Bulletin of July 17th. The International Shoe Co. is not only concerned about the correct point of shipment being shown on notices issued, but they insist such notices be mailed to the branch firm shown as shipper and not to the International Shoe Co., although the latter may appear and usually does appear on the label. For example, if shipment is forwarded by the Friedman-Shelby Shoe Co. branch, the notice should be mailed to them and not to the International Shoe Co.

* * * * *

836 Subject: Handling of Livestock Shipments.

In the event any difficulty is experienced in handling shipments of livestock due to the fact that the animals become excited and hard to control, notice is to be given transfer point or points and or final destination so arrangements can be made to have an experienced employe on hand to give those animals proper attention.

Subject: C. O. D. Shipments from Chic-Tone Co., Inc. Angola, Ind.—Compliance With Instructions.

The above concern has entered serious complaint because of failure of agents at various points to comply with
837 instructions applied to each and every C. O. D. shipment they make, the instructions reading as follows:

Notice to Destination Office If Refused or Unable to Deliver, Notify Shipper at Once and Do Not Return Until Ninety Days, The Chic-Tone Co., Inc., Angola, Indiana.

Should you handle any shipments from this concern, care should be taken to follow instructions appearing on their labels, referred to above.

Subject: Labels on Shipments of Baggage.

Bitter complaints are received from time to time from shippers of baggage being damaged by express employes placing different kinds of labels on tops, sides or ends of trunks and grips.

Many patrons purchase new trunks, grips, bags or suitcases, some of which are quite expensive, and they strenuously object to our defacing them by improper use of labels. Employes accepting these shipments must thoroughly understand the importance of avoiding the misuse of labels.

Rule No. 48 of General Rules and Instructions reads as follows:

> "Labels on baggage should be placed on the bottom, to avoid defacement; but if tag is tied on baggage, labels other than address labels must be pasted on back of tag with a portion overlapping the face."

I. Longaker,
Supt. of Agencies.

EXHIBIT 1-B

(Part 8.)

839 Railway Express Agency
(Incorporated)

Chicago, Ill., Oct. 3, 1934

All Agents:

Payment of C. O. D.'s and Paid Collections by R. E. A. Treasurer's Drafts.

Although the new method of paying C. O. D.'s and Collections has been in force since July 1st, the Assistant Treasurer continues to render reports of agencies failing to enclose C. O. D. Briefs or submit their Form 94 or 94-S, as the case may be in duplicate.

While Item 4 of the instructions on the remittance section of Forms 94 and 94-S carries information that the "original should be enclosed with the remittance and copy retained at the Agency, the instructions at the top of these Forms carry specific provision that the Form shall be completely filled out in triplicate. Also General Accounting Department Circular No. 124, dated May 23d, 1934, as well as Treasury Department Circular No. 8, specifically instructs that these forms should be prepared in triplicate and that the original and duplicate should be transmitted to the Assistant Treasurer and the triplicate retained as the agency record.

We want to make it clear that your Forms 94 or 94-S must in all cases be submitted to the Assistant Treasurer in duplicate. If any have misconstrued the instructions and have been following those contained in Item 4 on the remittance section, that should be immediately discontinued. If the failure to enclose your Forms in duplicate has been due to Item 4 please advise me.

The Assistant Treasurer also reports a substantial number of Forms 7175, C. O. D. Brief, are being received without the "Amount to be paid" being filled in. This means that the amounts must be filled in by Clerks in the Assistant Treasurer's office which slows up the issuance of drafts in favor of shippers. Please be sure to always fill in the "Amount to be paid" before the Briefs are sent to the Assistant Treasurer.

I. Longaker,
Supt. of Agencies.

EXHIBIT 1-B.

(Part 9.)

840 Railway Express Agency
(Incorporated)

Chicago, Ill., Sept. 27, 1934

All Agents:

Subject: New Method of Paying C. O. D.'s.

Information reaches us that some Agents have continued to remit C. O. D.'s by the use of American Express Money Orders. Under no circumstances are American Express Money Orders to be used for remitting C. O. D.'s or Collections.

Subject: Form 571—Notice of Matter on Hand Where Consignee Is Unknown or Cannot Be Located.

Referring to above subject mentioned in Bulletin of August 22d. Please maintain a record of the number of Forms 571 which you send to the Searching Bureau during the month of September, 1934 and March, 1935, and on October 1st and April 1st send me a memorandum showing the number of such forms you issue.

842 Subject: Loss and Damage.

The cold weather will soon be with us. At this time of the year, as a rule, there is a large floating population traveling back to Chicago from the farms and other locations and these men have no visible means of support. It is necessary therefore, that stringent measures be taken to protect the handling of express at your offices as well as on vehicles.

Indications are that this coming winter will see a larger number of these men than usual who will be out of employment who necessarily will have to live through the winter, and who will of necessity take extreme measures in order to pull through. It is a well known fact that during cold weather crime in general is on the increase, it likewise affects our business and it will, therefore, be necessary that everyone be thoroughly alert to prevent pilfering and stealing of shipments.

We want to avoid any increase in our loss and damage and, in fact, we desire that every effort be made to reduce this unnecessary loss, therefore, all employes must maintain a careful watch over our business.

843 Subject: Payment of COD's and Paid Collections by R. E. A. Treasurers Drafts.

Recently attention was called to the fact that an Agent who under the old system of handling C. O. D.'s was not furnished C. O. D. checks but who remitted in cash, subsequent to July 1st remitted cash to shipper and inadvertently listed the C. O. D. on Form 94 enclosing a C.O.D. Brief as well as forwarded the amount with his remittance to the Assistant Treasurer which brought about the duplicate payment.

Under the new system of handling paid C. O. D.'s it is no longer necessary for Agents not previously supplied with C. O. D. Money Orders to make C. O. D. settlements in cash direct to the shipper. C. O. D. payments from all agency points should be handled through the Assistant Treasurer.

Subject: Return Receipts Requested by Shippers.

Complaint has been received from the Central Life Assurance Society of Des Moines, Ia. that all Agents are not complying with their instructions to furnish them return receipts signed by the consignees, the shipper being willing to pay the additional classification charge of ten cents on each such shipment. This shipper forwards approximately 50 shipments per month, consisting of abstracts, on which they insist that a duplicate consignee's receipt be attached to each file. This patron forwards shipments to all parts of the United States, and, therefore, all agents when receiving such shipments must comply with Rule 15, Page 23 of Official Express Classification No. 32.

844 Subject: The Best There Is in Transportation—Expedited Service.

If "The Best There Is in Transportation" is to become an axiom, greater attention must be given to improving our service. Numerous reports are being received which reveal that a considerable volume of traffic is delayed.

When shipments are picked up in the early afternoon effort should be made to forward them on first available trains and not wait for the last train serving your office for the day. This will enable them to reach Chicago and other larger cities which may be transfer points in sufficient time to make early evening connections.

Another cause of complaint is the splitting of lot shipments. This should be watched by all offices. Deliveries must be made promptly on arrival. * * * We want to bring about a vast improvement in the handling of express matter.

Agents should prepare Form 1109 covering all misrouted or delayed traffic. * * * These reports should be sent to Mr. J. G. Ruble, General Manager Transportation, Chicago.

Subject: Claim Payments—Cut Flowers and Neon Signs.

For the seven months' period, January to July, 1934, claim payments on cut flowers amounted to $21,094. Much of this loss could have been avoided by more careful handling and affording better protection from freezing.

Shipments of cut flowers either received or forwarded must be properly protected to prevent damage.

There has also been a very heavy loss from the handling of Neon signs which indicates these fragile shipments are being allowed to fall or drop or otherwise roughly handled. Caution all employes to carefully handle this class of traffic to prevent damage.

I. Longaker,
Supt. of Agencies.

EXHIBIT 1-B.

(Part 11.)

849 Railway Express Agency
(Incorporated)

Chicago, April 1, 1937

All Agents:

Loss & Damage Prevention Campaign.

Please refer to my circular letter of March 23, 1937, relative to above campaign effective April 1st, and in which I asked you to prepare and send me, without fail, copy of every exception and inspection reports made at your office.

These reports will be thoroughly analyzed to determine causes for loss and damage, but this cannot be done successfully unless your Form 650 Exception Report and Form 679 Report of Apparent Loss or Damage are complete in every detail. The more you tell us on the reports, the better results we will obtain in the analysis.

Any case of improper packing, marking, billing or handling and any condition arising that tends toward making loss and damage should be reported, for correction of such conditions eliminates possibility of claims arising in the future from those causes.

You should make these reports in every case where proper and do not fail to make them legible and complete in every detail. On your reports rests the Company's chance to locate and correct the cause of claims which are now very much out of line with the business done.

I. Longaker,
Supt. of Agencies.

852 General Instructions.

1. This report is to be prepared in all cases where shipments are found in evident Bad Order.

2. It should be prepared in duplicate and is for information of Railway Express Agency and connecting Express Companies only. It must not be given to consignees or other outside parties. The original must be sent by express mail to destination office, the duplicate forwarded to the Superintendent in whose territory the report is issued.

3. Destination agents receiving these reports must carefully file them for ready reference and when claims are made this report must accompany claim papers sent to Claim Agent for handling.

4. When it becomes necessary to deliver a shipment in evident bad order to consignee, Form 679, "Notice to Consignee of Shipment Delivered in Apparent Bad Order," should be used.

5. Shipments discovered in bad order should at once be rewrapped at the place where the bad order is discovered and this report Form 650 made at that time.

6. At the point where a shipment is discovered in bad order and repairs made, the shipment must be carefully weighed and the weight found, compared with the weight marked on the shipment, if any. A full invoice of contents must be made hereon and this checked against the shipper's invoice if found in package, and a complete statement should be made of discrepancies if any noted.

7. The employe making this report, will make notation on back of the waybill covering the shipment, "Exception Report made by * * *" signing his name and title, route or office and date. This notation should not be placed on the shipment. If there is no waybill, make the notation on a plain shipping tag and attach to shipment. Agent at destination will remove the tag before making delivery. It will not be necessary for other offices to make Form 650 for shipments with this notation.

8. The object of this Exception Report is to place in the hands of Superintendents and Claim Agents, complete information as to the cause and extent of damage to shipments in transit and of errors or negligence. Employes who prepare these forms should bear this in mind and be explicit in the formation they give so that report will prove of value for purpose intended.

The items to be reported should include:

(a) Improper packing. Describe the kind and quality of the container, the nature and extent of interior packing, the quality of paper tape, twine, etc., used and state specifically wherein and how the container failed.

(b) Report valuable shipments which under our rules require special protection which were not being afforded protection of the Money Department or Freight Value Department as the case may be.

EXHIBIT 2-B.

855

Railway Express Agency
Arkansas Division

Little Rock, Arkansas
July 3, 1936.

Circular No.89

All Agents:

Request to Pick Up Merchandise for Return to Spiegel May Stern Company, Chicago, Illinois.

Spiegel May Stern & Company, Chicago, are making very extensive use of our collection service, which consists of requests to pick up merchandise for return to them.

They deliver to us at Chicago approximately 13,000 orders each month, all of which are forwarded to Agents by express mail in accordance with Item N (1) as appearing on Page 3, Supplement 9 to Official Express Classification No. 32.

Since these orders are being handled through express mail instead of waybilled as heretofore, it appears that many Agents are not giving them the attenion called for by the Classification.

They have made a complaint regarding this service, for the reason that a recent check of orders forwarded by them and returned by Agents during a fifteen day period developed that only 45% had been acted upon, by making report with return of the order, or repossessing merchandise for return to them.

It is imperative that Agents conclude their handling of these orders as promptly as possible after receipt, and if the merchandise cannot be repossessed, complete report of the circumstances should be promptly sent to Spiegel May

Stern to enable them to decide what further action they will take.

In order that we may retain this valuable business, you will please see that these orders are given prompt attention and handled in accordance with instructions.

E. E. Honn,
Superintendent.

Route Agents

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856 Railway Express Agency
Incorporated

District Accounting Bureau

Los Angeles, May 28, 1935

Subject: Revised Forms
May 1935 Reports

To all Commission Agents:

Under date of April 29, 1935 we sent you among other revised forms for use in preparation of May reports two Forms 96-B—Monthly Balance Sheet Commission Office. This means you use only two blanks monthly of Form 96-B until or unless otherwise advised. The original Balance Sheet you send to this office and you keep a copy. Superintendents I understand no longer want a copy.

In Circular Letter accompanying initial supply of revised forms sent you April 29, 1935 issued by General Auditor Gross Jr. he commented upon changes in the revised forms and you should keep that letter before you when preparing May 1935 reports, and also read printed instructions on different revised forms at times of preparation to insure correctness.

In connection with Collect Statement Form 54 I want to call your particular attention to the lower section thereof.

If you have more than one column of Value and Express Charges be sure you carry different column totals to the space and lines provided at right hand section of form. For example if you have a total in column 1, 2 and 4—1 and 2 is in upper section and 4 lower section Value and Express Charges—such totals should be carried to lines designated Column 1, 2 and 4 at the right, lower section of Form 54. Note particularly that Value and Express Charges, Column 4 Lower Section is the same as Value and Express Charges Column 1, 2 and 3 Upper Section and as such must be carried to the proper lines at the right and included in total. It is very important you be careful in preparation of this section Form 54 and enter figures in proper spaces provided. Also be careful when showing number of waybills in space provided at the bottom of Form 54 and include those listed on the lower section of this form as well as those of the upper section.

On summary section of Monthly Balance Sheet on the back also be careful to show number of revenue waybills in proper column. Likewise the non-revenue and remember such totals should conform to totals shown on B&E Forms 105. Last but not least note especially Paragraph 1 of the printed Instructions at top of Forms 53 and 54 (Statement Forms) about alphabetical forwarding agency arrangement of waybills.

Yours truly,

W. S. McNutt,

District Accountant.

857

Railway Express Agency
Incorporated

Los Angeles Division
Superintendent's Office

Circular No. 121

Los Angeles, Calif.
December 30, 1937

All Agents:

Rough Handling Fragile Instruments Forwarded by Majestic Instruments Company, Chicago, Ill.

Quoted below is letter of General Manager White's letter of December 24th, with respect to rough handling and attendant damage to shipments containing Electro Surgical Instruments and Short Wave Sets, forwarded by the Majestic Surgical Instrument Co., 2608 No. Cicero Avenue, Chicago,—

> "This concern ships Electro Surgical Instruments, also Short Wave Units to physicians, surgeons and hospitals throughout the country. Certain apparatus or instruments are enclosed in wood cabinets, which are in turn enclosed in approved cartons well labeled 'Fragile, Delicate Instrument,' also 'This Side Up'. There are also numerous 'Glass' labels on the sides of the cartons.
>
> "They have complained vigorously that particularly during the last three or four months there has been a very noticeable increase in damage to their shipments. Some of the coils have been badly broken in transit. They ship about 25 cabinets a month, as well as other shipments.
>
> "Since the shippers are insistent that we do something to stop this damage, it appears necessary to bring the matter to the attention of all employes throughout the country. We have covered the situation thoroughly in our terminal and vehicle service here."

Will you please watch out for these shipments and see that they are properly handled.

W. W. Argabrite,
Superintendent.

Railway Express Agency, Inc.

Office of Superintendent

Central California Division

Circular No. 13

San Francisco, January 28, 1936

All Agents:

Notice of Shipments on Hand.

Considerable trouble is being experienced at San Francisco account failure of agents at some of the smaller points to give proper notice to shippers of shipments which remain undelivered. As a matter of fact, this complaint is not limited to shippers in San Francisco—it crops up from time to time at various points throughout the country, and there is no reasonable excuse.

Some agents get the idea that if they advise consignee verbally that a shipment is on hand, and he promises to take delivery at a later date, no further action is necessary. That is all wrong. Agents should invariably issue postal notices to both shipper and consignee, and retain copies so we will have a record to stand on in the event of complaint at a later date.

See Paragraphs 388, 390, 391, 392, 393, 394 of General Rules and Instructions; also Paragraphs 387, 389 of Supplement No. 5 to General Rules and Instructions.

W. E. Carpenter,
Superintendent.

865

Railway Express

Washington, Alaska-Yukon Division

Office of Superintendent

Circular No. 5

Seattle, Jan. 21, 1938

All Agents:

Testing and Care of Scales.

I wish to call to your attention the importance of complying with Rule 1074, General Rules and Instructions, which reads as follows:

> "Testing of scales may be accomplished by using the loose weights accompanying beam scales. The starting test should be made to the capacity of such weights. Then replace the weights with any convenient material of equal weight; again adding the weights to their full extent and repeating the operation alternately to full capacity of scale. Shipments of different weights are usually available for carrying out this test."

Please see that this rule as well as others appearing on Page 71 of General Rules and Instructions are properly complied with.

C. I. Fitzgerald,
Superintendent.

866

Railway Express Agency, Inc.

Northern California, Nevada, Oregon Division—South Pacific Dept.

Superintendent's Office

No. 54

Sacramento, December 10, 1937

All Agents:

Shipments of Christmas Gift Subscriptions From Coronet, Inc. and Esquire, Inc. 919 N. Michigan Ave., Chicago, Illinois.

Esquire, Inc., publishers of "Esquire" and "Coronet" will forward this year approximately 175,000 shipments of Christmas gift magazines.

In order to reduce to a minimum the number of on hand notices, agents will be governed by the following:

If consignee lives beyond delivery limits, forward by Parcel Post and debit transfer this office.

If unable to locate, give directory service.

If shipment is still undelivered at expiration of free storage period, return.

If not home, deliver to neighbor, janitor, or leave in a safe place, marking on the ticket that it has been left.

If shipment is refused, advise consignee that it is a Christmas gift.

If consignee has moved and new address is known, forward prepaid at registered magazine rate and debit transfer this office.

Shipments returned to Esquire and Coronet should be tied in bundles and one shipment made thereof.

If possible, do not obliterate old marks on returns.

The above instructions cover about everything that could happen to one of their shipments, and, if followed, and no on hand notices are sent to the shipper, there will be a saving to us in the cost of these notices.

However, they do desire that on hand notices be sent as usual to the consignee.

V. R. Burton,
Superintendent.

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867 Railway Express Agency Inc.

Northern California, Nevada, Oregon Division—
South Pacific Dept.

Superintendent's Office

No. 50

Sacramento, December 1, 1937

All Agents and Messengers:

Baggage Shipments.

We repeat rule 91 of General Rules and Instructions:

> "Money, jewelry or other valuables must not be enclosed in trunks, suitcases or packages with ordinary merchandise unless such articles are described in the uniform express receipt issued for the shipment.
>
> "When trunks and other luggage are accepted for shipment, inquiry should be made to find out if they contain any articles of unusual value. If so, such information must be shown in receipt in accordance with this rule, and arrangements made to insure proper protection and handling of the shipment."

Since the discontinuance of sealing baggage shipments, there has been an increase in the number of claims presented covering that class of traffic, and it is not thought at this time that it will be necessary to go back to the former practice of sealing such shipments. It is felt if our Agents and employes would comply with the above quoted instructions, it would materially reduce our losses in connection with claims presented on baggage shipments, and all are directed to see that these instructions are complied with hereafter.

General Circular No. 4-G, Oklahoma Orchard and Nursery Law.

Superintendent Jones, Oklahoma City, calls our attention to the fact that a great many of our Agents are not complying with the instructions in Oklahoma section of General Circular No. 4-G, in regard to the forwarding of orchard and nursery stock into the State of Oklahoma; such shipments include cut flowers.

It will be necessary that a certificate as required by the Oklahoma State law be attached to all shipments of these articles before acceptance by you for forwarding into the State of Oklahoma.

868 To be of value export declarations must be correct and complete. The description and value of the goods must be in detail and true—no estimated or released values—the actual value of the goods. Instructions on the top, over each heading and on the back of the declaration form should be read and followed in detail.

The Export Division of the U. S. Customs at San Francisco are hereafter going to comply strictly with the regulations and will refuse to pass declarations which are improperly or incompletely filled out. For the information of our agents, following are some pointers which should be checked carefully when declarations are accepted from shippers:

Must be prepared in ink or typewriter—pencil is not acceptable.

Description must be complete—each individual kind and quantity of material must be stated separately with a value of each. For example—a shipment of 20 dresses should read somewhat as follows:

12 mixed cotton and wool dresses	Val.	$72.00
8 rayon dresses	Val.	32.00

The quantity should be stated in units of measurement of the particular commodity shipped such as, pounds, square yards, dozen, gallons, feet, etc.

Use one space for each item in the description column.

Instructions in Paragraph 2B (back of Form) require that declarations for shipments valued at $100.00 or over be notarized or verified by oath before a Customs Official.

All Agents will be guided by these instructions at all times.

V. R. Burton,
Superintendent.

869 Railway Express Agency Inc.

Northern California Nevada Oregon Division—
South Pacific Dept.

Superintendent's Office.

No. 53.

Sacramento, December 10, 1937

All Agents and Messengers:

Printed Matter to Sales Bureaus With Charges Collect.

We are advised there is an unnecessary amount of detail work in the Sales Bureaus growing out of our efforts to collect from shippers unrealized charges on shipments of advertising matter, printed matter, etc.

Attention of all Agents is directed to Rule 338 of our General Rules and Instructions, as such advertising matter, printed matter, etc., if sent collect, charges must be guaranteed by the shipper. If the rule were followed there would be no occasion for sending such shipments to the Sales Bureaus with charges to collect.

We must insist that hereafter all Agents comply with the instructions in this rule, and after notice is mailed if no disposition is given by shippers you must debit transfer the forwarding office for amount of charges within thirty days of the postal notices to shippers.

Change in General Circular No. 7-D
Live Stock, Live Animals and Bees.

Having reference to Tennessee section of General Circular 7-D:

These regulations provide that all dogs imported into the State of Tennessee, except performing dogs, must be accompanied by a health certificate certifying that rabies has not existed for at least three months within a radius of 25 miles of the origin of the shipment. Agents, before accepting shipments of dogs destined to Tennessee, will see that the Tennessee regulations are fully complied with before being forwarded.

V. R. Burton,
Superintendent.

EXHIBIT 17B

1101 Railway Express Agency.

(Incorporated)

Chicago, Ill., April 10, 1936.

Bulletin No. 47.

All Agents:

1103 Paid C.O.D.'s and Collections.

Recently, we have noticed Assistant Treasurer Van Loan has been obliged to return to Agents in this Division, C.O.D.'s on which shippers instructed signed contracts, notes, mortgages, etc. be accepted.

Such C.O.D.'s consisting of signed contracts or other papers, must not be remitted to the Assistant Treasurer.

Please refer to General Accounting Department Circular No. 124 dated May 23, 1934, second page, paragraph 3(b) which reads in part as follows:

> "When documents are to be returned to shipper the cash collected should be enclosed with collection brief and documents in money envelope (Form 6034) and sent forward to shipper under money waybill."

Shipments Handled in Air Express Service.

Paragraph (b) Item 3, Page 2 of General Accounting Department Circular 119-B dated February 1, 1936, reads as follows:

> "(b) The time of acceptance should be shown on all receipts issued for air shipments."

Also Paragraph 2, Section 2 of General Accounting Department Circular 123-B dated February 1, 1936, reads:

> "The destination agent should enter on the waybill and delivery sheet the time the shipment was receipted

> for, if not already entered thereon by the forwarding office, the time it was delivered to the consignee, and the time it would have been delivered if it had been handled entirely in rail express service."

Please see that the above instructions are complied with.

1105 Liquid Waybill Glue.

In the past, waybill glue has been furnished in one-half gallon or larger containers.

In order to avoid wastage, it has been arranged to furnish waybill glue in smaller containers, ranging from one pint upward.

Please confine your orders to quantities commensurate with your requirements.

Envelopes for Continuous Use.

Since June, 1933, the Company has been furnishing envelopes so designed as to permit of their use over and over again. This was first referred to in Operating Department General Circular No. 13, August 15, 1933, and is covered also by Paragraph 1119 of the January 1, 1936, issue of General Rules and Instructions.

It is very apparent that judging from the consumption of single-use enevelopes, forms 6002, 6061, and 6079, that the repeat envelopes are not being used as much as they should.

Furthermore, surplus returned to the Supply Depots indicate that two or three spaces are being used for one address and that the re-use envelopes are not being written up as indicated by the instructions appearing thereon.

These continuous envelopes must be used for company mail, reports, etc. when it is not absolutely necessary that a sealed envelope be used for communications of a confidential nature.

I. Longaker,
Supt. of Agencies.

PETITIONER'S EXCEPTIONS TO EXAMINER'S SECOND REPORT.

1263 25. To that part of the Examiner's report wherein on page 33 he states that the merchant agent, like the joint agent, is bound to comply with the rules and regulations of the Express Agency.

As we have stated previously, the joint and merchant agents are bound to comply with only those rules and regulations which apply to them.

ORAL ARGUMENT BEFORE THE RAILROAD RETIREMENT BOARD.

(June 9, 1939.)

[The following excerpts refer to the Railway Express Agency's Application For Employment (Form 100) which was Exhibit 11 in the first hearing.]

1291 The Chairman: This one application which is given on pages 7 and 8 of the Examiners first report, that is the single application which is signed by joint agents as well as exclusive employees.

Mr. Hartung: Yes.

The Chairman: Since you do have an employer-employee relation with your exclusive employees and since the application form, in specifying the details and manner of service unquestionably applies to your exclusive employees, is there any reason for saying that the specifications in this form as to the details and manner of service do not apply to these other men who are joint agents? Is
1292 there anything in the record which would justify a different interpretation of the same application form as it applies to these men who are joint agents?

Mr. Hartung: These men are not employees. We might not direct the independent contractors as to the manner of the work.

The Chairman: But both signed this same form. What is the difference? What happens in the case of each class of men?

Mr. Hartung: By the signing of the application form a man in one instance becomes an employee and in the other he becomes an independent contractor. The employee becomes bound by the rules of the company as to seniority rights and all other matters that affect an employee when he enters the service.

1295 The Chairman: This agreement says that he is going to conduct this business in accordance with the regulations of the company.

Mr. Hartung: So far as they apply, he is bound.

The Chairman: How does he know that the regulations do not apply to him, or which do and which do not? How does he distinguish between them?

Mr. Hartung: By practice and by understanding. That is the general practice. It is also true that by reason of the character of the instructions the agent knows whether he is bound by them or not, whether they are instructions that relate to the things he must do as an independent contractor or as an employee.

PETITIONER'S REFUND CLAIM NO. 1.

(November 20, 1943.)

1335 Statement on behalf of Railway Express Agency, Incorporated, Employer No. 6202, in support of its Claim No. 1, dated November ...., 1943, for Refund of Contributions.

Pursuant to suggestion made by the Railroad Retirement Board, the individuals here involved, for Railroad Retirement Board purposes, have been classified as follows:

"Contract" Occupational Classification	Occupational Group
391	Agents
392	Office attendants
393	Warehouse and platform form laborers
394	Vehicle employes
395	All others

For the purposes of this application, it is necessary to make a reclassification as follows:

1. Merchant Agents and their assistants
2. Joint Railroad-Express Agents and their assistants
3. Branch Agents
4. All others

1336 Statement.

Railway Express Agency, Incorporated, is a Delaware corporation engaged in the transportation of property by express, intrastate and interstate throughout the United States, in Canada, Cuba, Alaska and Hawaii, and as such is subject to the provisions of the Railroad Unemployment Insurance Act, the Carriers' Taxing Act of 1937, the Railroad Retirement Acts of 1935 and 1937, the Railway Labor Act, and the Interstate Commerce Act, and various regulatory laws of the United States and of the several states.

Railway Express Agency conducts express operations by rail, water, motor vehicle, and air. It began operations on March 1, 1929, succeeding the American Railway Express Company which had conducted the express transportation business since July 1, 1918, when it succeeded the Adams Express Company, the American Express Company, the Southern Express Company and Wells Fargo & Company, the principal express companies in the United States operating at that time. Railway Express Agency operates over all the railroads in the United States (it began operating over the lines of the Southern Railway Company and its affiliates in 1938) by virtue of a contract uniform as to terms and generally known and described as the Express Operations Agreement (copy annexed and marked Exhibit "1").

The Express Agency maintains approximately 22,000 offices throughout the United States. At more than 16,000 of those offices, the amount of business transacted is exceedingly small and the income derived therefrom does not warrant the employment of regular employes. 1337 At such offices, therefore, arrangements have been made to have the Express Agency represented by an individual in the service of a railroad, or by an individual in business for himself or otherwise engaged, or by a company. This situation always has existed in the express business. It was essential to make some arrangement for the handling of the few shipments at the smaller communities, in order adequately to serve the public.

At the larger places where the volume of business is substantial, the Express Agency has its own offices, facilities, equipment and personnel and employs large numbers of persons to conduct its operations at such points; but in the smaller communities where the business is limited to but very few shipments a day, it is not practicable or in the interest of good business to engage even one employe for the handling of that business. Consequently arrangements were made with individuals or companies who could handle the small valume of express business transacted in their communities as an incident to their regular business or occupation. This was done generally on a commission basis, *i.e.*, by the payment of a percentage, most frequently 10 per cent, of the express charges on the shipments handled by them.

1340 The Merchant Agent and His Assistants.

In order to afford a comprehensive express service throughout the United States, express companies found it necessary to establish agencies in small communities where the express business handled was negligible, in some cases amounting only to one or two shipments a day and sometimes even less. Obviously it was impracticable and in fact economically impossible to have service at these small places performed by regular employes of Railway Express Agency, Incorporated. Accordingly, where possible, arrangements were made with agents of railroads to handle the Express Agency's business. Such agents are known as joint railroad-express agents. However, in cases where it was impossible or impracticable to engage the services of the railroad agent, either because of his refusal to be bothered, the lack of a railroad agent in the community, or for any one of several other reasons, arrangements were made to have a merchant or a company or an individual mainly engaged in some other activity to represent the express company. Such agents are known as merchant agents.

A survey of the smaller agencies was made in
1341 March 1937, and at that time it was found that 1,469
agencies of the Express Agency were handled by the so-called merchant agent. Of these 1,469 agents, 734 were merchants or storekeepers, 56 were farmers, 53 were housewives, 92 were postmasters or postmistresses, 117 were in the trucking, drayage, bus or taxi business, 62 operated automobile agencies, service stations, garages and repair shops, and 12 were companies engaged in trucking, drayage, bus or taxi business. A number were engaged in occupations such as clerks, packing concern employe, coal company employe, insurance salesman, student, mail carrier, undertaker, painter, blacksmith and priest.

The merchant agent conducts the business of the express company in his community in his place of business. The express company generally furnishes him with counter scales and whenever the express business is so heavy as to require the use of the same, with four-wheel platform trucks. In order to comply with the laws regulating its business, it is necessary that the forms used in the conduct thereof be uniform and that the service rendered and the charges made therefor be uniformly applied to all patrons having occasion to use its service. (Interstate Commerce Act, Title 49 U. S. C., particularly Section 10). Accordingly, the express company necessarily furnishes each merchant agent, as well as every other agent receipting for and delivering express shipments, with a set of tariffs, forms for the receipt of express shipments, receipt of transportation charges, the delivery of shipments, waybill forms, abstract and prepaid shipments' forms, forms for statement of receipted collect business, and all other necessary forms. For the same reason the express company also furnishes each merchant agent with a copy of its

General Rules and Instructions and with any amendments thereto which specify the requirements which must be complied with by all agents in order that the express business shall be conducted lawfully and to the best interest of its patrons.

The Express Agency may not direct the merchant agent at any time as to where in his place of business the counter scales are to be kept, or where in his place of business the Express Agency's office is to be maintained, or that he shall serve the Express Agency's patrons before serving his own, or that he shall personally attend all of the Express Agency's business. Such agent may and frequently does have the Express Agency s business attended to from time to time by one or more of his clerks, as well as by himself without segregating the time spent in express service from the time spent in the regular business of the agent.

1342 The Express Agency has no power to punish the merchant agent for dereliction of duty, nor can the Agency sever the relationship with the merchant agent without losing the benefit of the use of the agent's premises upon which its business is being conducted.

The merchant agents are paid on a commission basis, generally about 10 per cent which covers not only their services but also the services of their assistants, the use of their premises and telephone and all expenses pertaining to their agency except for the cost of materials furnished by the Express Agency as above set forth.

The relationship of the merchant agent to the Express Agency as it existed during the period involved, and as it still exists, was the same long before it became necessary for the Express Agency to consider its effect in the light of the definition of employer and employe in the Railroad Unemployment Insurance Act. The Express Agency and its predecessors never did consider the merchant agent and his assistants as employes. The Agency never exercised any jurisdiction over them with respect to hours of labor.

working conditions, promotion and demotion. The pension plans of the Agency and its predecessors did not apply to such agents. Increases and decreases in wages have not been extended to them. Vacation plans of Railway Express Agency and its predecessors never have been extended to them. They are not entitled to free transportation on the railroads as are employes. They have never been included in the payrolls of the Express Agency and its predecessors, and they have never been reported as employes to the Interstate Commerce Commission as required of the Express Agency for all employes.

In these circumstances, the Express Agerey does not have the continuous right to control the manner of the rendition of the merchant agent's services and certainly not the right to control the manner of the rendition of the services of the merchant agent's assistants and, therefore, the relationship is not that of employe-employer within the meaning of the Act.

The Joint Railroad-Express Agents and Their Assistants.

At over 14,000 of the small communities in the United States, Railway Express Agency, Incorporated, is represented by the joint railroad-express agent. This individual is primarily employed by a railroad to act as its agent. His duties to the Express Agency are secondary to those
1343 he owes the railroad. By reason of his employment
with the railroad, the Express Agency obtains the benefit of the use of the railroad premises. The Express Agency itself lacks the power to discipline or discharge the agent. It may sever the relation, but by doing so it loses the benefit of the use of the premises upon which the agent works. By reason thereof, it lacks the right to control the manner of the rendition of the agent's work necessary to bring him within the definition of "employe" in the Railroad Unemployment Insurance Act.

The joint agent, like the merchant agent, may, and at times does, employ others to assist him in the conduct of his express business. Frequently he sells insurance policies for insurance companies, handles telegrams for the telegraph company, and performs other services as a general agent in his community. From the services, some of which are performed by individuals whom he employes, he obtains a profit.

Generally he is paid on a commission basis, although in some few instances he receives a stated sum which has been termed in express terminology a "fixed allowance." From these payments which he receives he conducts his agency, paying for all costs including the hire of additional help which he may find necessary, except the cost of things which are furnished him by the Express Agency which are tariffs and current amendments thereto, a copy of the General Rules and Instructions of Railway Express Agency, Incorporated, and current amendments which furnish the specifications of his work, all forms necessary for the conduct of the business, counter scales, and in those cases where warranted by the amount of business, four-wheel platform trucks.

The joint agent has never been considered an employe by the Express Agency and its predecessors. He has not been reported to the Interstate Commerce Commission as an employe as required of the Express Agency with respect to its employes. The pension plans of the Express Agency and its predecessors never did apply to such agents. Increases and decreases of wages have not been extended to them. They have never benefited from the vacation plans of the Express Agency or its predecessors. They are not subject to promotion or demotion in the Express Agency's service. They are not subject to that control required by the Act to constitute them employes.

THE THIRD HEARING.

(Session of August 10-12, 1948.)

1371 Appearances:

Fulmer Long, 547 West Jackson Boulevard, Chicago, Illinois, Attorney, Railway Express Agency, Inc.

Leo J. Hassenauer, 105 West Adams, Chicago, Illinois, Counsel for The Order of Railroad Telegraphers.

Everett L. Gordon, Associate to Mr. Hassenauer.

H. C. Kearby, Vice-President, The Order of Railroad Telegraphers.

Robert Morgan, Brotherhood Building, Cincinnati, Ohio, Vice-President, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

James L. Crawford, Brotherhood Building, Cincinnati, Ohio, General Counsel for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

W. M. Daughtrey, Assistant to Vice-President, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

A. H. Burns, Sparta, Illinois, Merchant Agent, Railway Express Agency.

C. C. Harrison, Rockville, Indiana, Merchant Agent, Railway Expres Agency.

* * * * *

1378 Examiner Funk: As you will note, this proceeding is, in part, a reopening of Jurisdictional Docket No. 2. Consequently, the record in that Jurisdictional Docket is before the Examiner in this proceeding, and exhibits intro-

duced at the previous hearing will, of course, not have
1379 to be reintroduced. The proceeding has been designated as R. R. B. Jurisdictional Docket No. 2-2A.

* * * * *

1381 Examiner Funk: Mr. Long, would you like to make an opening statement on behalf of the Railway Express Agency?

Mr. Long: Yes, I would, Mr. Examiner.

Railway Express Agency, Incorporated, hereinafter referred to as Railway Express, proposes to show as follows. Railway Express has approximately 22,000 agencies throughout the United States, in Canada, Cuba, Hawaii and Alaska. At each of these agencies, Railway Express is represented by an agent who falls within one of the following classifications: salaried agent, exclusive commission agent, joint railroad-express agent, merchant agent and branch agent. The salaried agent and the exclusive commission agent have always been considered and treated as employees; the joint agent, the merchant agent and the branch agent have always been considered by Railway Express as not employees.

* * * * *

1382 Joint agents are employed full time by a railroad as agent and while so employed also represent Railway Express as agent. They include all individuals within the scope rule of any agreements between Railway Express and the Order of Railroad Telegraphers.

Railway Express proposes to show that merchant
1383 agents, their assistants, helpers and employees, and that branch agents, their assistants, helpers and employees (who are not full time employees of a railroad) as hereinafter defined are not its employees within the meaning of the Railroad Retirement Act and the Acts related thereto, particularly the Railroad Unemployment Insurance Act.

* * * * *

1383 * * * Generally merchant agents are paid a commission, usually 10% of the express charges on shipments handled by them. However, in some instances they are paid a contract sum per month—I might say in some few instances there—or a commission plus a stated sum per month. These payments cover the work performed by the agent and his helpers, assistant and employees, the use of the premises where the agency is operated, and all facilities generally used in the operation of the agency such as telephone, electric light, and tools and materials used, except the necessary forms for the conduct of the express busi-
1384 ness, some stationery supplies, a complete set of tariffs, Railway Express Agency's General Rules and Instructions setting forth the specifications for the conduct of the business, usually a counter scale, and in some instances a platform truck or a safe or both. The General Rules and Instructions include rules which apply to the conduct of employees and to the manner in which they shall conduct their work for Railway Express, but only those rules which are in the nature of specifications as to results apply to the merchant agents. At times letters and bulletins are addressed to all agents including merchant agents directing their attention to specifications which should be followed in order that results required be obtained.

All individuals representing Railway Express as employees or independent contractors such as merchant agents are required and always have been required to fill out a form having Railway Express number 100, entitled "Application for Employment." Prior to 1945 this form included an application for a fidelity bond. The "Application for Fidelity Bond" part of Form 100 bound the merchant agent to see that the express work at his agency was performed in accordance with the specifications in the rules and regulations of Railway Express. No helper, assistant or employee of a merchant agent ever was or is required to fill out or sign Form 100. During 1945 the "Application for Fidelity Bond" was eliminated from Form 100, and is not required any more from employee or independent contractor.

Railway Express necessarily uses thousands of different forms in the conduct of its business, and from a practicable and economical point of view it is necessary to keep the number of such forms to a minimum. Accordingly, it was found inadvisable to add an additional form for use only with respect to independent contractors.

In minimizing the number of forms Railway Express uses a single form, that is Form 95, for the transfer of accounts at each commission agency from one agent to another, whether the agency be operated by a joint agent, exclusive commission agent, or merchant agent.

* * * * *

1386 A branch agent generally is an individual but may
be a corporation or a partnership, and frequently is a
hotel. Like the merchant agent, he is generally engaged in
some other business and operates his branch agency as a
side line. His private business is located within the pickup
and delivery limits of a regular salaried agent. He receives
calls usually by telephone requesting that a driver of Rail-
way Express pick up a shipment and he transmits these
calls to either a truck driver of Railway Express or to the
salaried agent. He permits undelivered shipments to be
held on his premises for call by the consignee and he re-
ceives shipments for holding at his office and eventual
1387 pickup by the express driver.

All the express work which the branch agent does is performed upon his premises, and if the relationship is severed, Railway Express loses the benefit of the use of such premises.

A branch agent generally is paid in accordance with the number of calls he receives or the number of shipments which are received or delivered at his premises.

Generally a branch agent is furnished only with forms of express receipts but a few branch agents are furnished, usually at their request, with a copy of the General Rules and Instructions and a copy of the applicable tariffs. I might add there that most all of them do have the applicable tariffs but very few have a copy of the General Rules and Instructions, and those who have obtained it because they requested it

The branch agent is not required to make out monthly reports or statements as is the merchant agent, and only a few letters and bulletins are addressed to him as to the specifications of his work.

* * * * *

1388 Now I might add this, at this point. There have been prepared by the Accounting Department of Railway Express exhibits from information received from the Operating Superintendents showing all individuals who were considered merchant agents representing Railway Express between and including January 1, 1937 and December 31, 1945. These exhibits also purport to show the helpers, assistants and employees of such agents who received any compensation from express work. Recently my attention was directed to some agencies in these exhibits and a check has shown that some individuals are listed therein who perhaps should be considered as joint railroad-express employees.

Railway Express is a consolidation of a number of express companies such as the Adams, Wells Fargo, American, United States and others, each of which had in use nomenclature peculiar to itself and now having various shades of meaning in the express business. Joint railroad-express agencies are often changed to merchant agencies when the railroad agent will not or cannot any longer handle our business; and merchant agencies are often changed to joint agencies when the railroad agent evidences a willingness to handle the express business. These factors possibly have caused some confusion among the superintendents as to some few cases.

In any event, when a clear definition of merchant agent is established at the hearing, Railway Express should like an opportunity to check these exhibits for the purpose of eliminating those agencies which do not fall within that definition.

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1390 Examiner Funk: Mr. Long, in your statement with regard to the joint agents, do you also include your assistants to joint agents?

Mr. Long: Yes, we do. We state that for the record.

Examiner Funk: You admit both of them to be employees for this proceeding?

Mr. Long: The joint agents and their assistants, employees and helpers who are credited with any compensation from express service are employees of Railway Express Agency.

Examiner Funk: For the purpose of the record, do you intend to define assistants to joint agents?

Mr. Long: I shall, if you desire. I haven't considered that. We might define assistants, helpers and employees of joint agents as all those individuals who are reported to Railway Express Agency, Incorporated by said joint agent as his helpers, assistants and employees on Railway Express Agency Form 7051.

Examiner Funk: Do you intend to introduce a copy of that form?

1391 Mr. Long: Yes, we shall.

Examiner Funk: You may proceed.

(To Mr. Hassenauer.) Do you wish to make any statement at this time, or do you wish the Express Agency to go ahead and present their evidence?

Mr. Hassenauer: I would like to make a brief statement, if the Examiner please.

The Order of Railroad Telegraphers in this case represents all joint railroad-express agents coming within the scope of the collective bargaining agreements effective between the Order of Railroad Telegraphers and all railroads throughout the United States subject to the Railway Labor Act, the Railroad Retirement Act and the Unemployment Insurance Act, and all those joint railroad-express agents who come within the scope of the collective bargaining agreements referred to by Mr. Long which the Railway Express Agency, Incorporated has promulgated with the Order of Railroad Telegraphers in the Southeastern Territory. The Order of Railroad Telegraphers has represented the joint railroad-express agents in the hearings before this Board, more particularly in Jurisdictional Docket No. 2, referred to by the Examiner and by Mr. Long, and the contentions that were made in those proceedings on behalf of the Order of Railroad Telegraphers were sustained by this Board holding that joint railroad-express agents are employees of Railway Express Agency, Incorporated within the purview of the Railroad Retirement Acts of 1935 and 1937. The ruling of the Examiner in those proceedings was confirmed by this Board in its Opinion of August 1, 1939, referred to by the Examiner in his opening statement. Since the Opinion of August 1, 1939 by this Board, adopting the findings of fact and conclusions of law of the Examiner in Jurisdictional Docket No. 2, the Order of Railroad Telegraphers has entered into collective bargaining agreements with approximately 19 railroads in the Southeastern Territory, with the Railway Express Agency, concerning rates of commission and certain work-

ing conditions of these joint railroad-express agents
1392 while they are employed by Railway Express Agency
in the performance of express work. These agreements have been filed by Railway Express Agency, Incorporated with the National Mediation Board in conformity with the mandatory provisions of Section 5(e) of the Railway Labor Act. The various Boards created under the Railway Labor Act, the National Railroad Adjustment Board and the National Mediation Board, have likewise rendered Opinions holding that joint railroad-express agents are employees of Railway Express Agency, Incorporated. They held that they are primarily employed by the railroad and secondarily by Railway Express Agency, Incorporated.

The Supreme Court to the United States has held, in 321 U. S. Court 342, that where an agreement has been effected between an express agency concerning commissions to be paid to joint railroad-express agents, no change could be made in that agreement unless the express agency taking over that agreement had entered into negotiations with the duly authorized representatives of such employees. In that case, Mr. Justice Jackson—I will refer briefly to his statement made in that Opinion, which I think may be of some assistance to the Board in this case—Mr. Justice Jackson in that case said: "Employees here involved were agents at stations on the Seaboard Air Line Railroad who primarily are employees of the railway and secondarily of Railway Express Agency. They receive compensation from each employer."

In view of the contentions which have been made here by Railway Express Agency on the record, it appears that the Order of Railroad Telegraphers here is in the capacity of trying to be of assistance to this Board in whatever character it can in this hearing. Whether we will introduce any testimony will depend upon the testimony to be introduced in this case by Railway Express Agency and by any of the other parties either in a representative or individual capacity.

* * * * *

1396 Mr. Burns: Well, I have been an agent at Sparta, Illinois since 1914, and in 1918, when I had typhoid fever, I was relieved by an agent of the Express Company at that time, not by someone that worked with me, like he stated. I have continued as agent during all those years, and the Board ruled before that we were covered by the Act, and I feel that if I spent 34 years and have been directed by them and made my reports to them, that I should be classed as covered by the Act.

Examiner Funk: Well, then, Mr. Burns, you intend to testify a little later with regard to your work as merchant agent?

Mr. Burns: That's right.

* * * * *

1597 Examiner Funk: I have before me a letter written by Mr. W. A. Benson, vice-president of your organization, with the initial "J" beside the title.

Mr. Long: I believe that is Mr. Jump. He is assistant to the vice-president in New York.

Examiner Funk: This letter is dated January 29, 1942, in which he makes a statement of the designation of what a branch agent is. I would like to read that to you and ask you if that is still the opinion of the Express Agency. The letter is addressed to Mr. Lester P. Schoene, General Counsel, Railroad Retirement Board, and has reference to the case of one Mr. E. C. Hargraves, the branch agent at Merrimac, Massachusetts.

Mr. Morgan: Is that part of the previous case?

Examiner Funk: We have it here in our files. It is one of the letters upon which L-42-298 was based, which Opinion you referred to in your opening statements, to which you have referred in the demand for refund.

Mr. Long: That is correct.

Examiner Funk: Mr. Hargraves is one of the individuals mentioned in that Opinion.

Mr. Long: Yes. I recall. That is true. Could
1598 I read that letter? I don't remember it.

(The following paragraph was read by Mr. Long from the letter referred to by Examiner Funk.)

> "The designation 'branch agent' is used in express operations to differentiate between a 'merchant agent' who is the official representative of Railway Express Agency, Inc., in his community and a 'branch-package receiving agent' who conducts an independent trade or business of his own and on the side receives calls for the driver of Railway Express Agency, Inc., to pick up express shipments and accepts shipments from patrons in the locality of his place of business for transportation by Railway Express Agency, Inc."

Examiner Funk: That is the paragraph I had particular reference to.

Mr. Long: Yes. I would say that is descriptive of the branch agent, but there are a few cases where the branch agent has also received shipments from the driver who has been unable to effect delivery of them and who has held such shipments at his place of business for call by such consignee. That, however, is the exception, and there are very, very few of those. In fact, I don't know of any particular instance at this time, but I am told there are a very few.

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Session of March 14-16, 1949.

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1704 Examiner Funk: Mr. Long, on behalf of the Railway Express Agency, do you have anything to say about your various classes of agents at this time?

Mr. Long: Yes, I do. We have modified our definition of merchant agents, and I have prepared a statement that I would like to read with respect to that modified definition.

To make it possible for our operating people to 1705 easily identify the merchant agent and properly classify him we have decided to narrow or confine somewhat our definition of merchant agent as appearing on pages 9 to 12, inclusive, of the transcript of the hearing held August 10 through August 12, 1948, and in accordance with the narrowed or confined definition of merchant agent, we have eliminated from our exhibits what might be considered as borderline cases. We except from the merchant agent class all of those agents who do not themselves control, either by ownership or by lease, the premises upon which their express office is located. Accordingly, item B on page 11 of the record of the hearing beginning August 10, 1948 is to be eliminated, and item A restated as follows: 'A housewife who has her express office in her own home."

Under this narowed definition of merchant agent, there will be eliminated from our claim all so-called caretaker agents and custodian agents and such agents as C. C. Harrison of Rockville, Indiana, who testified at the August 10, 1948 hearing, and Roscoe Wilson, Chenoa, Illinois, and Wilma Mehl at Mt. Sterling, Illinois, concerning who Mr. Lace testified. The testimony appears on pages 259 to 262, inclusive, of the hearing beginning August 10, 1948. The terms caretaker agent and custodian agent have been used to describe the same kind of class of agent—that is, an individual who acts as caretaker or custodian of the railroad station where the sale of passenger tickets has been discontinued and freight service is limited to inbound prepaid shipments, and who operates his express office in the station, usually on a commission basis, although there are a few who are paid a fixed allowance per month and who at times may have been referred to by our officials as contract agents.

I might add that the term contract agent generally in the express business refers to an agent who is paid a stated sum per month for the conduct of the entire agency, and who has been considered in the same light as an exclusive commission agent. However, in some cases our people have loosely referred to contract agent as applying to any agent wheo may be paid a stated allowance
per month and who in fact may be a merchant
1706 agent, a branch agent, a custodian agent a caretaker agent, an exclusive commission agent. In other words, the mere fact that an individual is paid a stated allowance per month does not truly identify him, although that characteristic has been used by some of our people as identifying the man wrongly as a contract agent.

Examiner Funk: Well, Mr. Long, in the Examiner's report on the first hearing, Examiner Schoene, at page 3 of that report, stated: "Individuals rendering service for the Express Agency may, for the purpose of this report, be divided into the following six groups." He lists six groups there, Mr. Long, and I am wondering if at this time you can now state to us on the record the various groups into which all express agents may be divided.

[Mr. Long's statement of definitions of the various classes of agents is printed in Petitioner's appendix, pages 443-7.]

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1710 Examiner Funk: Mr. Morgan, you said you have some questions?

Mr. Morgan: Yes, for the purpose of clarification, and if Mr. Long doesn't mind. Now, these six characterizations that are shown in the Examiner's findings of the hearing back in December 1937, I believe—was it your intention, Mr. Long, to take issue with those different characterizations as they are set down in that hearing, or merely to amplify each? I wonder if you would mind explaining that, at least for our side of the house, as well
as to also satisfy the record for the benefit of the
1711 Board. Putting it differently, do you take issue with
those characterizations, or do you agree that they
were properly set down and you are only undertaking in the record here today to amplify those characterizations? That is the point I want to get clear.

Mr. Long: My purpose here is to amplify those categories, and that, I believe, is what we have done.

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1713 Examiner Funk: The Examiner wishes to make one statement with regard to pickup and delivery, referred to by Mr. Long. Whenever the pickup and delivery work is performed by the joint agent, the merchant agent, or the branch agent, as heretofore defined by Mr. Long, the agent's status with respect to his pickup and delivery work is before the Examiner. Where the pickup and delivery work is performed by someone who is otherwise in some other capacity employed by the Express Agency, and in his other capacity is covered by this hearing, his status with respect to the pickup and delivery
work is before the Examiner. However, in cases
1714 where the pickup and delivery work is performed by
someone under a contract with the agent and the work is performed in the individual's own truck, and he performs no other work of any nature which could be

considered employee service for the Express Agency, his status is not before the Examiner.

(Remarks off the record, at the request of Mr. Hassenauer.)

Mr. Morgan: Mr. Examiner, I cannot say, without having an opportunity to analyze your statement, whether or *not* we have a clear understanding of the issue before the Board.

(Remarks off the record, at the request of Mr. Morgan.)

Examiner Funk: Do you wish to make any further statement?

Mr. Morgan: I think not, Mr. Examiner. I understand your position exactly.

Examiner Funk: The Examiner having explained to Mr. Morgan that he is making no determination with regard to the employee status of the individuals who in their own truck perform pickup and delivery work under a contract with the joint agent, and who perform no other work which might be considered as employee service for the Express Agency, Mr. Morgan then stated that he agreed.

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1738 Examiner Funk: Mr. Long, for the purpose of the
1739 record, category No. 1: Do you admit these individuals are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: We do.

Examiner Funk: Category No. 2: Do you admit that the individuals herein described are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: We do.

Examiner Funk: Category No. 3: Do you admit that the individuals herein described are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: For the purpose of this proceeding, we do.

Examiner Funk: What do you mean "for the purpose of this proceeding?"

Mr. Long: I mean that we are waiving our claim, and that for the purpose of this hearing we concede that they are employees. With respect to some other law or some other situation, they might not be considered as employees, but with respect to this proceeding, which I understand will develop a ruling as to whether they are or are not employees under the Railroad Retirement Act and the Carriers' Taxing Act—

Examiner Funk: We are not ruling under the Carriers' Taxing Act.

Mr. Long: Just the Railroad Retirement Act and the Railroad Unemployment Insurance Act—that they are employees.

Mr. Morgan: Mr. Examiner, as I understand Mr. Morgan's answer, he unequivocally admits that they are, for the purpose of these proceedings.

Examiner Funk: For the purpose of these proceedings.—How do you designate this category No. 3? What do you call these individuals?

Mr. Long: Joint employees.

Examiner Funk: With respect to category No. 4, 1740 do you admit that the individuals described herein are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: For the purpose of this proceeding, we concede that they are employees.

Examiner Funk: Category No. 5: Do you admit that these individuals described herein are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: For the purpose of this proceeding, we concede that they are employees.

Examiner Funk: Within the meaning of both Acts.

Mr. Long: Within the meaning of both Acts.

Examiner Funk: Well, Mr. Long, I note that in category No. 5, and also in category No. 9, you refer to custodian and caretaker agents.

Mr. Long: Yes, I do. I do that because some express people have referred to some custodian or caretaker agents as merchant agents when they operate a business in addition to their work as custodian agents and express agents.

Examiner Funk: Would it be possible for you, Mr. Long, to include in category No. 5 all the individuals you have designated as caretaker or custodian agents?

Mr. Long: It would be, as far as I designate them. I can't speak for everybody in Express Agency. Some mistakes might be made, but if they are called caretaker or custodian agents, and if the facts show that they are such within this definition, we concede that for the purpose of this hearing they are employees.

Examiner Funk: With regard to category No. 6, Mr. Long, what is your contention?

Mr. Long: We contend that those individuals and those agents are independent contractors and not employees within the meaning of the Acts involved in this proceeding.

Mr. Crawford: Pardon me, Mr. Examiner, I would
1741 like to clear up one point there, Mr. Long, with reference to No. 6. I noticed in your categories on page 3 of the original hearing, you refer to them as "individuals." When you get into 6 here, in your supplement, you say "individuals, corporations and/or partnerships." Now, as I recall the testimony, some of these men that appeared in your behalf as witnesses testified that their business was on some occasions a partnership, and probably on other occasions it might have been a corporation. But, as I understand it, these individuals are the merchant agents doing the work, you say incidental to their busi-

ness, but in fact it is the individual himself who is the merchant agent and not the corporation or the partnership. Is that correct?

Mr. Long: That is not correct. Now, some time ago the Railroad Retirement Board ruled that the individuals actually performing the work were employees of Railway Express Agency even though the contract for the operation of the agency as a merchant agency was between Railway Express Agency and the employer of such individual, which was a corporation or a partnership or something other than an individual. We do not agree with the Board's ruling on that, and I believe that this hearing has been called for the purpose, among other things, of clarifying that situation.

Mr. Crawford: That's the reason that is now inserted at this time and was omitted at the first.

Mr. Long: Well, those are categories which were set out by the Examiner, not by the Express Agency, in the Examiner's report—not by the Express Agency.

Examiner Funk: What page is this?

Mr. Crawford: I was referring back to page 3. This is what called my attention to it.

Mr. Long: He was referring to the Examiner's report. That is not the original hearing.

Examiner Funk: With regard to category No. 7, what is your contention, Mr. Long?

1742 Mr. Long: We contend that such agents are independent contractors and not employees.

Examiner Funk: With regard to category No. 8.

Mr. Long: We are waiving our claim as to them also and concede that probably most of them are employees. There are so many and various situations that it is impracticable if not impossible within the confines of a hearing such as this to define each and every individual and say whether each one is or is not an employee. Frankly, I don't think that anything will come up with respect to them, but I can't lock the door against any of them who might later on come in and say that they are not employees. We are waiving our claim as to them, and that is about all I can say.

Examiner Funk: With regard to category No. 9, do you admit that these individuals are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: For the purpose of this hearing, we do, and I might add that we do consider them as borderline cases but we are waiving on them in order to make the definition of merchant agent more sharp and to enable our people and the Board to better determine whether a particular agent is within or without the category of merchant agent.

Examiner Funk: You state that you are waiving your demand, Mr. Long. Are you admitting for the purposes of the Railroad Retirement Act that they are employees?

Mr. Long: Yes. For the purpose of this hearing, we do.

Examiner Funk: Category No. 10: Do you admit that the individuals herein described are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: For the purpose of this hearing, we do.

Examiner Funk: Category No 11: Do you admit that the individuals herein described are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

1743 Mr. Long: We contend that such individuals are independent contractors.

Examiner Funk: Category No. 12: What is your contention there?

Mr. Long: We contend that they are employees of an independent contractor, and therefore not employees of Railway Express Agency.

Examiner Funk: And with regard to category No. 13?

Mr. Long: We contend that they are not employees of Railway Express Agency within the meaning of the Acts involved herein.

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MR. STEPHEN P. VICTOR, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

Recross Examination by Mr. Hassenauer.

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1789 Mr. Victor, going back to these assistants to joint agents, are they reported to the Railroad Retirement Board of employees?

A. They are, and also under protest.

Q. For the purposes of this hearing, do you admit that they are employees?

A. Yes.

Q. What are included within the term "assistants to joint agents?"

A. Usually someone he may employ as a clerk to assist him in doing the office work. He may employ him as a driver to operate his own truck in delivering and picking up express.

Q. Operating the agent's truck?

A. The agent's truck. That's about all.

By Mr. Long:

Q. How about unloading trains and loading trains, Mr. Victor?

A. We include those also.

Q. And some clerical work too?

A. That's right.

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MR. W. S. HALL, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

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Redirect Examination by Mr. Long.

1849 Q. Mr. Hall, I refer you to the first category, covering
1850 an exclusive agent who is paid a wage or salary
and who is carried regularly on the payroll. Will you cite a typical example?

A. You want a particular office?

Q. Yes, we want the particular office.

A. Names?

Q. If you have the name.—One here in Chicago, if you have one, would be satisfactory, I believe.

A. I'll give you Kenosha, Wisconsin.

Q. Now, how many employees has our agent at Kenosha, Wisconsin, who are regularly recognized employees, and who are on the regular payroll?

A. I couldn't give you that accurately at the present time.

Q. Could you give us an estimate?

A. Oh, yes, I could give you an approximate figure.

Q. And how many are there, approximately?

A. Well, we have the agent, cashier, on-hand clerk, foreman, and I would say ten drivers or combination delivery clerks.

Q. Is our office at Kenosha operated in a building owned by the Express Agency?

A. It is not. It is operated in a building that we lease, have occupied for years, across the street opposite the Chicago-Northwestern passenger station.

Q. Are the vehicles which are used in the performance of pick-up and delivery service at Kenosha vehicles that belong to Railway Express Agency?

A. They are the property of Railway Express Agency and are garaged in a garage attached to the building.

Q. And are all of these vehicles painted the express colors, green and red?

A. They are.

Q. And they all carry express signs?

A. They do.

Q. Now, does the agent there do any physical work at all?

1851 A. He does not.

Q. His work is exclusively supervision?

A. Supervision and—

Q. And solicitation?

A. Yes, and his desk work, of course.

Q. Now, in receipting for shipments at Kenosha, are the regular forms of Railway Express Agency used?

A. They are.

Q. And who makes those out?

A. The drivers or clerks.

Q. Regular employees of Railway Express Agency?

A. Yes, sir. I might add, for the benefit of the record, there happens to be no transfer at Kenosha, and we do have a truck line operated from Kenosha to Twin Lakes.

Q. Does any railroad serve Kenosha?

A. Chicago-Northwestern.

Q. And do regular employees there take care of the loading and unloading of express to and from trains?

A. They do.

Q. Do you have any of these so-called train meeters at Kenosha who are not on the regular payroll of Railway Express Agency?

A. We do not. They are either clerks or combination clerk-drivers.

Q. To whom do the drivers employed at Kenosha make their settlements?

A. To the cashier.

Q. And to whom does he report?

A. To the assistant treasurer and the district accountant.

Q. Who prepares a balance sheet at Kenosha?

A. The cashier.

Q. And who signs it?

A. The cashier.

Q. Does the agent at Kenosha make internal checks of the cashier's account?

1852 A. Yes, periodically.

By Examiner Funk:

Q. Do you have any of these so-called exclusive employees at any agency where the exclusive employee would be the only one there?

A. You mean a one-man agency?

Q. Yes.

A. I don't recall any one-man agency left in the division.

Examiner Funk: Can you tell us, Mr. Long, whether or not there are any such?

Mr. Long: Yes. I think Mr. Lace testified that there was such a party. We will put him on the stand.—I might ask, is it usual, Mr. Hall, for an exclusive commission agency to be opetated by one man?

Witness: Yes.

Q. Do you consider that the individuals referred to in category number 1 are exclusive commission agents?

Mr. Long: Do you know of any salaried agency where there is only one man, Mr. Lace?

Mr. Lace: Yes, I do.

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1859 MR. G. C. LACE was recalled for examination and testified as follows:

Redirect Examination by Mr. Long.

* * * * *

1861 Examiner Funk: Mr. Long, since one of the things we wish to determine here are the factors distinguishing the various categories, I trust that you will endeavor to supply us with the copies of the various forms to which any witness refers, so that we may be able to compare them as we go to the various categories and see which agents complete which.

Mr. Long: Well, Mr. Examiner, we concede that all of these agents use and are required to use the uniform receipts, that they are required to comply with the regulations of the Interstate Commerce Commission. We concede that payroll employee agents are employees. Also, I believe the payroll employees are not within the notice of the meeting.

Examiner Funk: That's right. It is merely in order to compare the various classes to see how they can be distinguished.

Mr. Long: Now, Railway Express Agency has, I believe, in excess of 1500 forms. It would be impracticable to clutter up the record with all of those forms. Salaried agents may at various times be required to use almost all of
1862 those.

Examiner Funk: All of the 1500?

Mr. Long: All of the 1500 forms—whereas these merchant agencies are required to use a comparatively few. Now, if you want that 1500, I will endeavor to get them for you, but it does place a burden upon us and it will get your record here to the time when we have our conflict with Joe Stalin.

Examiner Funk: Well, Mr. Long, can you at least have the witness describe to some extent the various forms to which he refers in his testimony?

Mr. Long: Yes, I'll be glad to do that.

Q. Take this business and expense form. Is that form prepared by a merchant agent, Mr. Lace?

A. No.—I'll qualify that. The salaried agent to which I referred, Tuscola, Illinois, prepares a weekly business and expense report in addition to a monthly business and expense report. The merchant agent prepares only a monthly report.

Examiner Funk: Are these reports similar?

Q. That monthly report of the merchant agent is a balance sheet, is it not?

A. No. I don't know exactly the name of the report. At the salaried office, it is Form 104, and I think Mr. Gross perhaps could tell what the form number used—

Mr. McAdam: 105.

A. At the commission office, 105. It is not as complete a report as the one that is made at the salaried office.

* * * * *

1863 Q. When you speak of Form 105 showing the commissions paid the agent and other expenses, what do you refer to as "other expenses?" Are those allowances made to the agent, if any?

A. Yes. If we make an allowance other than the commission, that would show on the report.

Q. Is that the only other expense that would show up on 105?

A. Yes, that's true.

Q. So that there would not show on 105 any wages paid assistants or employees of the merchant agent, or any telephone cost, or any light cost that he himself assumed. Is that correct?

1864 A. That is correct.

By Examiner Funk:

Q. Mr. Lace, instead of using a merchant agent, for example, let's take a joint agent. Would your answers be the same?

A. I don't believe I understand, Mr. Funk, just what answers.

Q. The answers you have made in regard to the forms completed by merchant agents and the forms completed by salaried agents in category number 1. Would your same answers be given if we were comparing the forms completed by a salaried agent in category number 1 with the forms completed by a joint agent?

A. No. The forms completed by a commission agent are similar to the forms completed by a joint agent.

By Mr. Hassenauer:

Q. Mr. Lace, isn't it a fact that the forms used by a joint agent are entirely different than the forms that may be used by a merchant agent? They don't all use the same forms in making reports to the management.

A. They use similar forms—a balance sheet, the statement form, an abstract form.

Q. But there are other forms required of a joint agent which a merchant agent does not make out. Isn't that correct?

A. I do not recall any others.

* * * * * *

1866 By Mr. Long:

Q. Mr. Lace, do you know of any examples of agencies within category 2?

A. Yes. The agency at Jerseyville, Illinois comes within that category. At the time I was Superintendent of the Central Illinois Division, H. Croes, C-r-o-e-s, was agent at Jerseyville.

Q. Do you know who owned the premises or controlled the premises where the agency operated by Mr. Croes was located?

A. The Railway Express Agency controlled the premises through a lease.

Q. Was pickup and delivery service afforded the public at Mr. Croes' agency?

A. Yes, sir.

Q. And who owned the vehicles in which that service was operated?

A. Railway Express Agency.

Q. Who maintained the vehicles in which that service was operated?

A. Railway Express Agency.

Q. And how many vehicles were maintained there, if you know, for that service?

A. One.

Q. How many assistants or employees did Mr. Croes have exclusively engaged in the performance of Railway Express Agency work?

A. I'm not certain, but I do know that at one time he
employed an individual for one or two hours a day
1867 or something like that, to stay in the office and keep
it open while he was out performing the pickup and
delivery service.

Q. Now, category "(a)" qualifies the exclusive commission agent as performing no service other than Railway Express Agency service and earning a net return in excess of $125 per month. Are there any so-called exclusive commission agents who perform only Express Agency service and who may earn a net of less than $125 per month?

A. Yes, I think there are.

Q. There are some?

A. Yes.

Q. So that there should be added a third subdivision to category 2.

Examiner Funk: Will you define that?

Mr. Long: Yes. We will call it category 2(c): Those who devote all of their time to the service of Express Agency and who earn a net return of less than $125 per month. These agents are not subject to the rules agreement with the Brotherhood of Railway Clerks, and their positions are not subject to bid and are not placed upon a roster.

Examiner Funk: Does the Express Agency admit that these individuals are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: The Express Agency does. We concede that they are our employees. We do not confess that they lack some of the attributes of an independent contractor, but we concede, for the purposes of this hearing, and we have always contended, that they are employees. We have given them the privileges of employees, but nevertheless they may have some of the attributes of an independent contractor.

Examiner Funk: When you have completed your discussion of category number 2, will you advise me?

Mr. Long: Yes.

1868 Q. Do you know of any examples of category 2(b), Mr. Lace?

A. No, I do not. That fluctuates. Perhaps a man two or three months would make a net in excess of $125, but it might drop down to lower.

Q. Now, I think you have reference to the category I just defined as 2(c). Do you have any knowledge of an agency who is covered by 2(b)?

A. Oh, yes, I do have knowledge of such an agency. Farmington, Illinois was in my district at the time I was a route agent, and the agent at that point a good many years ago—I think his name was Elliott—comes within that category.

Q. I take it that you do not have knowledge of an example of the category I have just defined as 2(c)?

A. No, I do not.

Q. Well, now, assuming that there is such an agent covered by category 2(c), would you say that the agents concerning whom you have testified as covered by category 2(a) and 2(b) and this hypothetical individual covered by category 2(c) would all use the same forms in conducting their express agency?

A. Yes, they would.

Q. Would they, for example, be required to make a report of solicitations to Railway Express Agency on Form 156, Exhibit XXVIII?

A. They would.

Q. And what other forms would they be required to make?

A. They would be required to prepare a balance sheet supported by statement and abstract forms.

Q. And they too would be required to issue the uniform express receipts, such as Exhibit XXXVI, upon the receipt of shipments for transportation in express service?

A. Yes, they would.

Q. Now, what are these forms, this balance sheet that you speak of and these other forms, that they make out? Will you detail those and describe them, please?

1869 A. The balance sheet is a record of the revenue received at the office. The statement is a record of the inbound shipments, and the abstract is a record of the outbound shipments.

Mr. Long: Did you want to examine the witness on this category?

By Examiner Funk:

Q. Mr. Lace, to your knowledge, are there any differences between the forms completed by individuals in categories 2(a), (b) and (c), and the forms completed by individuals in category 1?

A. Yes, there is a difference.

Q. What is the difference, Mr. Lace?

A. The forms completed by the individuals in category 1 are more detailed than the forms completed by the others. That is particularly true of the balance sheet. We have one type of balance sheet for salaried offices, and one type for commission offices.

Mr. Long: And this balance sheet for commission offices is used by all commission offices, no matter what they may be. Is that true?

Witness: That is true.

Mr. Long: That includes merchant agencies.

Witness: That is true.

Q. Would you say, Mr. Lace, there is any difference between the forms completed by individuals in categories 2(a) and (b) and (c), and the forms completed by merchant agents?

A. Very little, if any, difference.

Mr. Long: I direct your attention to Exhibit XXVIII, Mr. Lace.

Witness: I overlooked that. That is Form 156, Report of Public Relations and Sales Activities, required of those in categories 2(a), (b) and (c), but it is not required of those in joint commission or merchant commission agencies.

Q. Would you say that is the only exception?

A. No, it isn't. I have overlooked forms that are required from the individuals in 2(a), (b) and (c), in
1870 connection with the operation of our motor vehicles.

If we furnish the motor vehicles, we require a report of expenses on that

Q. Mr. Lace, when you testified last August with regard to exclusive commission agents, it is my recollection that you said there were some few instances where those individuals did not devote all of their time to the express service. Are those individuals the same individuals that were described in category 2(b)?

A. Yes, that would embrace those individuals.

Q. Mr. Lace, what kind of outside service, if you know, is performed by individuals embraced in category 2(b)?

A. The agent at Farmington, Illinois, to whom I referred, performs some pickup and delivery of LCL freight for the railroad serving that city.

Q. Is that the only example you have?

A. That is all I can think of at this time.

* * * * *

1875 Q. Do you know of any examples in category number 5, Mr. Lace?

A. Yes. H. W. Dierker, D-i-e-r-k-e-r, agent at Fowler, Illinois, comes within that category.

Q. Will you state for the record, Mr. Lace, where the express agency at Fowler is located?

A. In the building owned by the railroad which serves that town.

Q. Do you know the duties of the agent to the railroad?

A. He is considered a custodian or caretaker of their property in that town and would unload a shipment of prepaid freight if it were received at that town.

Q. Does the caretaker agent fill out the same forms and use the same forms as merchant agent?

A. Yes, sir.

1876 Mr. Long: That is all.

Examiner Funk: Does he fill out and complete the same forms as used by a joint agent?

Witness: Yes, sir.

Examiner Funk: Would your testimony with regard to the difference in the forms completed by individuals in categories number 1 and 2 as distingiushed from the forms completed by a merchant agent, be the same with respect to forms completed by an individual in category number 5?

Witness: Yes, sir.

* * * * *

1877 Mr. Long: That is number 9, Mr. Lace.

A. An example of number 9 would be the one mentioned therein, C. C. Harrison, Rockville, Indiana, also Wilma Mehl, Mount Sterling, Illinois.

Q. Who owns or controls the premises in which the agency is operated at Rockville, Indiana?

A. Railway Express Agency.

Q. By reason of lease or ownership?

A. By reason of lease.

Q. Now, is that the only difference between the agency at Rockville and a merchant agency?

A. That is the only difference.

Q. What you have testified with respect to Rockville applies also to Mount Sterling, does it not?

A. It does.

By Examiner Funk:

Q. Are individuals described in category number 5(a) granted any employee privileges?

A. No, they are not.

Q. Do you consider individuals now described in category number 5(a) as employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

A. Yes.

Mr. Long: That is, for the purpose of this proceeding, we do.

Q. Are the individuals therein described furnished with telephone service by Railway Express Agency?

A. No.

Q. I believe that Mr. Harrison testified that the Express Agency furnished him with a telephone, did he not?

A. Perhaps he did. If he did, I would say that is a correct statement.

Q. Are you familiar with the facts at the station at Rockville, Indiana?

1878 A. No, I am not. That was not within my—

Mr. Long: Except what you heard Mr. Harrison testify here.

Witness: Yes.

Q. Do you know of any differences between the terms caretaker agents and custodian agents?

A. No, I know of no difference.

Q. Would you say that the caretaker and custodian agents are generally at a railroad station where the sale of passenger tickets has been discontinued and freight service has been limited to no more than the receipt of inbound freight prepaid shipments?

A. Yes, I would.

Q. How are these individuals compensated for their services?

A. Usually on a commission basis.

Q. Are they sometimes compensated on a fixed sum allowance or stipulated sum per month basis?

A. They might be, yes.

Q. Is there any difference in the work performed by these individuals and the work performed by merchant agents?

A. No.

Q. Do you expect from them the same type of service that you would expect from a merchant agent, or do you consider that they perform a higher type?

A. I consider that they perform a higher type, and we are, generally speaking, able to get the kind of service from them that we desire, because we go to their railroad employers and obtain their assistance in getting what we want.

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1917 MR. PAUL GROSS, JR., was recalled for examination and testified as follows:

Direct Examination by Mr. Long.

• • • • •

1918 A. My service with the express industry commenced on July 14, 1902.

Q. And in the course of that service, you worked for various express companies, did you?

A. My service at the commencement was with the Adams Express Company until June 30, 1918, and with the American Railway Express Company from July 1, 1918 until February 28, 1929, and with Railway Express Agency since March 1, 1929.

Q. In the course of your experience, have you become acquainted with the terminology applied by various express companies to various agents?

A. I have.

Q. And will you detail what you found with respect thereto?

A. May I preface that explanation with this word: that prior to July 1, 1918, although in the earlier testimony I referred to four principal express companies, so-called express companies, there were in fact about a dozen of them. There was the Adams Express Company, the American Express Company, the Southern Express Company, Wells-Fargo. They were the principal express companies. There were also the Great Northern Express Company, the Northern Express Company, the Western Express Company, the Pacific Express Company, the Globe Express Company, the United States Express Company, and sundry other smaller express companies which conducted the express transportation business in the United States. Prior to July 1, 1928, as I said, there were these old express

companies. Effective July 1, 1918, all of those operations were conducted by the one express company, the American Railway Express Company, which commenced operations on July 1, 1918, and continued until February 28, 1929. During those many years, and during the time that the express companies were making their reports to the Interstate Commerce Commission with respect to their revenues, expenses and other detailed information, there were
1919 two general categories of express agents in which
the accountants for the express companies were interested—namely, those that were on salaried basis and those that were on a commission basis. Salaried agents were paid on the payrolls of the express companies, received a stipulated sum of pay for their services, and commission agents were paid a commission generally at the rate of 10%. The rates of commission naturally varied in different parts of the country and with the different express companies. Not until the advent of the Railroad Retirement Act and the Unemployment Insurance Act was it essential for the accountants in the express service to distinguish between the various classes of commission agents to develop their relationship with the express company. Then when that became necessary, to make that distinction or differentiation, we found these many different categories of agents, some of them called joint railroad commission agents, some merchant agents, branch agents, and these various other categories to which we have referred in this matter.

* * * * *

1920 * * * In the outlying residential districts, in years gone by, for many years, during at least the forty-seven years that I have been in the express service, in residential areas, in order to accommodate the patrons so that they may be able to forward their express shipments without waiting for a vehicle man to come to call for their shipments, we established in merchants' stores, drug stores

nd other facilities, other stores that were open a sub-
tantial part of the day, so-called branch agencies or
ranch agents. They are not exclusively employed by the
xpress company. They are not salaried employees. They
re in fact not agents, agencies, in the manner in which
e generally refer to the agencies. It is not a separate
ffice.

* * * * *

In the residential areas, outlying areas, it wouldn't be
possible to provide these unusual shippers or individ-
921 uals making shipments at unusual times—to provide
them with a call card. They had no facilities for dis-
laying it, apartment houses or hotels. We wouldn't think
f being permitted even to go to some hotel room to pick
p a shipment that somebody in a certain room wanted
o have forwarded to San Francisco. So we established
ranch agents in hotels, or at YMCA's, or other places
here any number of people who may want to ship by
xpress could leave their packages to be called for by the
xpress company at some regular time during which the
river would call for the shipments.

y Examiner Funk:

Q. Are these people sometimes referred to as call
gents?

A. They are. The call agent was distinguished some-
hat, I think, from these branch agents in that a call agent
n most places did not do more than accept a telephone
all from someone and carry that forward to some regularly
stablished agency of the Express Company, so that a
all would be made for the shipment.

* * * * *

922 A. * * *. The branch agents generally were set
up to suit the convenience of shippers in outlying
reas where we did not maintain an exclusive salaried

branch office, if I may designate them as such. Some reference was made to the exhibit entitled "Official Directory"—I do not know what the number was.

By Mr. Long:

Q. I show you Exhibit XXXIII, and ask you to explain the use which Railway Express Agency puts that exhibit to.

A. The official directory is, as shown by the cover, a list of the offices with block location and schedule of first and second-class express rates. In the regulation of express companies and their rates and charges by the Interstate Commerce Commission, the express company is required to publish the rates from each point to each point, more specifically as they are stated from each block to each block throughout the United States. Each block is represented by the degrees of latitude and parallels of longitude. The express company is required to publish with the Interstate Commerce Commission a list of offices, places, at which it will accept shipments for transportation by express. Those tariffs are much more voluminous
than is this official directory, so-called. For the con-
1923 venience of our people throughout the country—that
is, at the principal offices, at least—we publish these official directories and show the block location of each office in the United States where we maintain an office, and provision is made for showing the scale number, which is equivalent to showing the rate per 100 pounds which applies from the point of origin to the point of destination. The directory does not purport to show the number of or the location of any branch agent. In other words, we show, for example, that in the City of Chicago there is an office at Chicago located in block number 838-B. It is listed there only once. It enables the agent in San Francisco to determine what the rate is from San Francisco to Chicago and, by the schedule of first and second-class rates and charges in the back of the book, enables him to determine

hat the charge is for a shipment of a particular weight om San Francisco to Chicago. There is no reference this directory to the fact that we have a large number so-called branch offices; there is no reference in this rectory to the fact that we may have branch agents. here is no reference in this directory as to what kind of n agent or what kind of an office it is, whether it is a laried office, a commission office, or what kind of a comission office it may be.

Examiner Funk: Are any branch agencies actually sted therein?

The Witness: They are not—not as branch agents.

* * * * *

925 Q. When you refer to offices in the testimony you have just given, you do not, I understand, include ranch package receiving agents.

A. I do not. If I may once more refer to this Exhibit o. XXXIII, each of those places designated is an office, isregarding for the moment any such places as Wauwaosa, what we call "waybill to" offices. There are a numer of them here where we indicate, for example, Osboro, ndiana, waybills to Hammond, Indiana, and we do not ave a regular office at Osboro, Indiana, any more than e do at Wauwatosa, Wisconsin. But every one of these ffices prepares its reports periodically, salaried offices aily, commission offices generally once a month, prepare heir balance sheets, their statements and their abstracts, egardless of whether they may be merchant agents or oint railroad-express agents or salaried agents.

* * * * *

1928 *Cross-Examination by Mr. Hassenauer.*

Q. Mr. Gross, in your previous testimony before this Board in the August 1938 hearing, you were asked whether you reported joint railroad-express agents to the Interstate

Commerce Commission as employees of Railway Express Agency, Inc , and you said you did not.

A. I think, if I may add to that answer, Mr. Hassenauer, I think the question was as to whether we had reported the compensation to them as for salaried employees, or whether we include the compensation in our wage statistics filed with the I. C. C. The answer is, we do not.

Q. Since the Order has been entered by the Railroad Retirement Board in Jurisdictional Docket No. 2, you have reported to the I. C. C. joint railroad-express agents as employees of Railway Express Agency.

A. No, we have not.

Q. In view of the hearing now being conducted before Examiner Funk, and in view of the record that has been made here with respect to the joint railroad-express agents to the effect that they are regarded for the purpose of this hearing as employees of Railway Express Agency, Inc., do you contemplate reporting the joint railroad-express agents to the I. C. C. as employees of the Railway Express Agency?

A. We do not.

Q. Can you state to the Examiner the reason why you will not report them as employees, in view of the record made in this case?

A. For the reason that, as I explained before, sal-
1929 aried employees are the only employees whose time
and compensation we include in the wage statistics which we supply to the Interstate Commerce Commission, and the only compensation which is included in the wage accounts, of which there are some dozen or more, which we report to the Interstate Commerce Commission, whereas the joint railroad-express agents are compensated on a commission basis and the compensation is properly chargeable to an I. C. C. account prescribed by that commission, Account No 39, titled "Commissions", in which we would

clude the compensation we pay to joint railroad-express
ents. The compensation which we pay to joint railroad-
press agents varies considerably. There is no stipulated
m per month which we pay to those individuals. Their
mpensation is on a basis of commission, generally of 10%.
some cases, the joint railroad-express agent may receive
very small amount of commission; in other cases, it would
larger. If we were to include in our wage statistics re-
orted to the I. C. C. the compensation we paid joint
ilroad-express agents, we would entirely distort our wage
atistics reported to the Commission.

Q. Does the Interstate Commerce Commission make any
fference between a wage or salary paid to an employee
d a commission paid to one, and on that basis determine
hether or not he is an employee within the purview of the
quirements of the Interstate Commerce Commission for
porting such individuals?

A. The Interstate Commerce Commisison makes no dis-
nction between what the Railroad Retirement Board may
nsider as employees or nonemployees within the meaning
f the Railroad Retirement Act. The accounting classifica-
on prescribes merely that the compensation of salaried
mployees shall be included in the wage account and in the
age statistics independent of the account, and that the
ompensation paid commission agents shall be charged to an
ccount entitled "Commissions".

Q. In the hearing in August 1938, you were asked
930 this question by Mr. Schreiber, now Associate Gen-
eral Counsel of the Railroad Retirement Board: "In
his connection, did you ever ask the Interstate Commerce
ommission to supply you a different form, if possible, or
lid you call their attention to the fact that the form was not
nade up to fit the particular circumstances?" Do you re-
all that question?

A. I do.

Q. Have you, since that hearing and the Order entered by the Board in Jurisdictional Docket No. 2, ever required the Interstate Commerce Commission to supply you with a different form?

A. We have not.

Mr. Hassenauer: That is all, Mr. Examiner.

Examiner Funk: Mr. Crawford.

By Mr. Crawford:

Q. Mr. Gross, in the exhibit, the official directory in which you list the towns which you cover, I understood you to say it doesn't show or designate the branch agencies but it makes no distinction, does it, as to the offices where there are merchant agents or commission agents or salaried agents?

A. It makes no distinction. It merely indicates that there is an office at that particular point, and does not say whether it is a salaried office or a commission office, a merchant agent or any other kind of an agent.

Q. It might be any one of the group.

A. Except a branch agent. It could not be a branch agent, except in that particular case of Wauwatosa or in those several other cases throughout the directory where we indicate we have service at such a point but do not have an office there and then say where the business shall be way-billed to and what rate applies.

* * * * *

Session on July 28, 1948.

1968 Examiner Funk: I understand, Mr. Long, you have some further testimony you wish to introduce at this time.

Mr. Long: Yes. At the opening of this hearing I would like to state that when we were in here during March I was asked to define certain groups or classifications or categories of individuals and others who represent Express gency in various capacities. I had not anticipated at that ne the need for such a close definition of the classes or tegories, and since then I have prepared a statement hich I should like to read in the record.

(Remarks off the record.)

Mr. Long: Because the definitions of these groups or classifications, sometimes referred to in the record as 69 categories, as set forth in the Record of the hearing held between and including March 14 and 16, 1949 pear in need of clarification and amplification, Railway xpress Agency, Incorporated submits the definitions set rth below. For brevity Railway Express Agency, Inrporated is referred to as "Express Agency" and the otherhood of Railway and Steamship Clerks, Freight andlers, Express and Station Employees is referred to "The Clerks." The references in parentheses are to the ges in the Record of the hearing of March 14-16, 1949 here the former definitions or statements relating thereto pear.

1. Individuals, some of whom are in charge of agencies, no devote all their time to Express Agency service, and no are paid on a wage or salary basis from the regur payroll. These individuals are called "exclusive emoyees." (R. 324) All in this classification are conceded be employees.

2. Individuals in charge of agencies, who are granted ivileges of employees, such as free transportation and aid vacations, and who are paid on a commission basis on the basis of a stated sum per month. The premises pon which their agencies are located are controlled by the xpress Agency through lease or ownership. These have een referred to in this record as "exclusive agents" or exclusive commission agents." (R. 324) They may be ubdivided as follows:

(a) Those who devote all of their time to the service of the Express Agency, and who earn a net return in excess of $125 per month. These agents are subject to the Rules Agreement between The Clerks and Express Agency, and their positions are subject to bid and placed upon a roster. (R. 325)

(b) Agents who devote substantially all of their time to the service of the Express Agency, but who may perform some independent business of their own, and who earn net commissions of less than $125 per month. This subdivision contains but very few individuals, and those who are within this subdivision generally are former salaried employees. (R. 325)

1970 (c) Those who devote all of their time to the service of the Express Agency and who earn during the course of a year an average net return of less than $125 per month. These agents are not subject to the Rules Agreement with The Clerks, and their positions are not subject to bid and are not placed upon a roster. (R. 485)

All in these classifications are conceded to be employees.

3. Individuals who perform service both for the Express Agency and for one or more railroad companies, and who are paid either by the Express Agency or by a railroad company on a salary basis from the regular payroll, for both their express and their railroad service. These are called "joint employees". (R. 325) All in this classification are conceded to be employees.

4. Individuals who are regular full time railroad agents and who concurrently with their railroad duties act as agents for Express Agency. Railroad and express work are performed on premises furnished by the railroad. They are paid by the railroad for their railroad work and by Express Agency for their express work. For their express work they are paid a commission or stipulated sum per month. These are called "joint railway-express

ents." (R. 325) For the purpose of these proceedings y are conceded to be employees.

). Individuals paid a commission or stipulated sum per nth who represent the Express Agency as agent on emises controlled by Express Agency through lease, or contract with the railroad upon which the agency is ated. These individuals are permitted and generally do rform some other work or operate an independent busiss in addition to their express work. They have not en granted paid vacations or free transportation and ver have been considered as employees by Express gency. They may be subdivided as follows:

(a) Individuals who have some railroad occupation ch as pumper, station clerk, or caretaker of a railroad station where the sale of railroad passenger tickets
71 has been discontinued and freight service has been limited to no more than receiving inbound prepaid ipments, and who operate the Express office in the railad station or on other railroad premises and are paid Express Agency a commission or stipulated sum per onth. These have been referred to in Express circles "caretaker agents," "custodian agents," "joint gents," or "joint employees." (R. 325)

(b) Individuals who have no railroad connection but ho by reason of the relationship between Express Agency id the particular railroad conduct the Express Agency irt time on such railroad premises. (R. 327) An exame is Roscoe Wilson, Chenoa, Illinois.

(c) Individuals who occupy business premises in which iey may or may not perform some business of their own addition to express work where Express Agency pays ie rent direct to the landlord, who is not the agent, for ie premises used for the operation of the Express Agency. Examples are Wilma Mehl, Mt. Sterling, Illinois and C. C. Iarrison, Rockville, Indiana. (R. 327) lassification 5 covers the individuals previously de-ribed in categories 5 and 9. (R. 494)

By reason of the control which Express Agency may be titled to exercise over the premises upon which the ency is conducted, it is conceded that for the purpose of se proceedings all in this classification are employees.

5. Individuals, corporations or partnerships who, in njunction with or in addition to some other activity en-rely outside of the railroad industry, act as Express gent and have their Express office on premises which they ntrol by reason of ownership or lease or rights superior that of the Express Agency. Any one of these agents permitted to have a part or all of the work performed any of his designees. These agents are paid generally a commission basis; however, a few are paid a fixed lowance or stipulated sum per month, and a few a commission plus a fixed allowance per month. These have
72 been designated as merchant agents and may be subdivided as follows:

(a) A merchant or small business man who conducts independent business and at the same time carries on e express work in his regular place of business such as grocery store, hardware store, garage, etc. These may further subdivided as follows:

A. Those who have no connection whatever with any ilroad.

B. Those who act as caretaker of a station for a rail-oad, or have some other incidental connection in the rail-oad industry.

(b) A doctor, priest, minister, public official, who at the stitution where he is employed or engaged in some other ctivity represents the Express Agency as agent.

(c) A housewife who conducts her Express Agency in er home.

(d) An employee of a business not within the railroad

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y who with the consent of his employer has the
s office in his employer's place of business. (R.
l 326)
n this classification are not employees.
ndividuals, hotels, YMCAs, warehouses, retail
and the like who perform on premises owned or
led by them, a part or all of the following work
nection with Express business: (a) Receipt for ex-
or baggage transfer shipments on their premises,
shipments are picked up by the Express driver;
rmit undelivered express shipments to be held at
its premises for call by the consignee; (c) Receive
usually by telephone, requesting that a driver of
y Express Agency pick up a shipment at a desig-
ddress, and transmit such calls to either an Express
or agent; and (d) Influence students and others to
press service in the transportation of their baggage
undry. These agents are paid so much per shipment
received, although in some few cases they are paid
nission or fixed allowance. These we shall designate
nch package receiving agents. In Express circles,
hey have been referred to as branch agents, branch
package receiving agents, sub agents, influencing
gents, campus representatives, or call agents. (R.
d 327) All in this classification are not employees.
Those individuals who have been referred to in our
as "All Others." It would be impracticable for the
se of this hearing to define each classification within
laim, and Express Agency is waiving the claim with
t to them. They include janitor service, station
er service, the meeting of trains, and other incidental
They include policemen and individuals having
r gainful employment in a broad variety of busi-
. They are paid directly by Express Agency and
rm the service they render Express Agency on its or

oad premises. (R. 327) Express Agency waives its n as to them.

Individuals regularly employed by the joint agents ssist them in the performance of Express work at the road station. (Formerly 10 as shown on page 327 of ord.) These are conceded to be employees for the pose of this record.

(a). Individuals casually, intermittently or seasonably loyed by the joint agents to assist them in the performance of Express work at the railroad station. We eve these should be considered as not employees.

0. Individuals regularly employed by the joint agent perform pick-up and delivery service in vehicles owned the joint agent. (Formerly 11 as shown on page 327 Record.)

a) Those who perform platform work or railroad work addition to driving pick-up and delivery vehicle. These conceded to be employees for the purpose of this ord.

b) Those who do no express work or railroad work er than driving pick-up and delivery vehicle. These are employees.

1. Individuals employed by the merchant agent to assist him or to perform entirely the Express work 74 he engages to perform pursuant to his agreement with Express Agency. (Formerly 12 as shown on ge 327 of Record.) These are not employees.

12. Individuals who perform all or a part of the work branch package receiving agent engages to perform in half of the Express Agency. (Formerly 13 as shown on ges 327 and 328 of Record.) These are not employees.

Mr. Morgan: Mr. Funk, this statement that has been esented by the counsel of Railway Express Agency so to expedite the proceedings—you understand we are t bound by that statement in one way or another—the erks.

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Long
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iner Funk: Nobody is bound by that statement, rgan. The statement which has been read by Mr. merely an expression of the Express Agency's in this matter, as I understand it.

ong: Exactly.

* * * *

Session on August 7, 1950.

R. J. P. NOLL, a witness produced by The Order of Railroad Telegraphers, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hassenauer.

Will you state your full name, Mr. Noll?

John Patrick Noll.

You are General Chairman of The Order of Rail- elegraphers, on the Missouri Pacific Railroad?

Yes, sir.

* * * *

Examiner Funk: Mr. Long, with regard to the ndividual who signed the questionnaire designated ibit LXV, what is your position?

Long: Mr. Examiner, there appears to be some conflict in the evidence as to the status of Mr. rs at Wabash, Arkansas. Assuming that he repre- Express Agency and conducted his express busi- ess exclusively in his store, we would consider him s an independent contractor. Assuming that he erformed express work at the railroad depot, we consider him as an employee. We say that solely e of the fact that there is need in this case to draw between those who are employees and those who are ployees, or those who are independent contractors ese who are not independent contractors. The line

rather fine one because there are some persons who
sent Express Agency as agent who have a number of
haracteristics of an independent contractor and at
ame time may have a few of the attributes of an
oyee. Now, in making our definition, we have put
' those who perform the work on railroad premises
classification of employees. That was brought about
ly by reason of the amendments to the Railroad Re-
ent Act, which I believe became effective in 1946.
aminer Funk: Referring again to Exhibit LXV, Mr.
, and particularly to Mr. Bumpers' answer to ques-
5, "Do you handle business at store or have they
t? Answer: Store"—in the event this individual
ld be found to perform both his railroad and express
in the store, would your answer in any way be
ged?
. Long: It would not.

* * * * *

Mr. Noll: Well, I'd just like to mention the fact
that you will find a lot of places on railroads where
have an agent in the $200 class, and assigned hours,
with the permission of the railroad company, he oper-
his elevator, although he has help. but has fixed his
so that he can do his book work and handle his busi-
for both at his elevator. The simple reason is that
oes not want to go down and build a fire and keep an
clean. He can do this work when he ain't got any-
g else.

Mr. Long:

Well, now, would you know of any specific instances
that?

Yes. Elyria, Kansas—McPherson. He's a restricted
ator position.

xaminer Funk: That isn't on the exhibit. Do you
v of some others, please?

r. Noll: This man formerly ran this little station, and

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that's

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him to

e checked it up, he was doing three, four thousand
worth of business a month, and he was subject
ur check to be entitled to that rate of pay, and
what they paid him.

Well, he is considered evidently a joint agent be-
is express business is handled on the railroad
s. You say that this man at Elyria has employees
rate his elevator business?

He's got men working under him part of the time,
se, not all the time. They run the elevator.

His express business is handled on railroad prem-
ake it?

A. When he rebuilt his elevator, he enlarged his
fice, and he's got one section of it there where he
ndles his railroad and express business. He's not
own there to the depot, a half block away, and he
s work right there.

He does the railroad work there too, you say?

The railroad and express.

ong: Well, he is not on our exhibit. He is one
unusual cases. I've never heard of a case like that

rawford: Well, that's the thing that puzzles me,
aminer. Now, Mr. Long says it is an unusual case,
wonder how many of those so-called unusual cases
e.

ong: That is not in our exhibits.

rawford: No, but when the Board makes its de-
how is this Board going to determine how many
e men we have? Here we have been on merchant
Now we are getting into joint agents who are
in the same category, where he claims they are not
ees.

Long: Well, the railroad pays him a salary. He
ecognized employee. He operates his business in
evator by reason of the fact the railroad permits
do so.

Mr. Morgan: Mr. Long isn't talking to the subject at all. The testimony by Mr. Noll, Mr. Examiner, was, here was a man at Elyria, Kansas that ran an elevator, something like a block away from the railroad premises—

Mr. Noll: Now, wait a minute. From the railroad station. He is still on the railroad right of way.

Q. He is on the railroad right of way?

A. His elevator is, sure. He wouldn't be off the right of way.

Examiner Funk: Mr. Long, how would you compare this, using your terminology, "unusual case," with the situation where an individual has a store, and with the permission of the railroad handles his railroad work in the store, and also his express work?

2186 Mr. Long: I cannot answer for the railroad. I do not know what arrangement the railroad would have with the man. I can only say that we would consider a man who is conducting the express agency in a business independent from the railroad industry as an independent contractor. That is where I draw the line.

Examiner Funk: How would you place this man at Elyria, then?

Mr. Long: The man at Elyria is on the railroad premises; he is on the right of way. He is a full time employee of a railroad, and according to what Mr. Noll says, I presume he handles express business there.

Mr. Noll: Eight hours within a spread of twelve.

By Examiner Funk:

Q. Mr. Noll, when you said this individual was on the railroad right of way, you didn't mean to say, did you, that he was on the property owned by the railroad?

A. His elevator is. You see, it's right along the side track, and it's leased from the railroad.

Q. Then it is actually land owned by the railroad?

A. Yes. There is a station there as well. * * *

* * * * *

EXHIBIT NO. XXXIII.

1948 Official Directory.

(Listing offices, rates, officials, etc., of the Railway Express Agency.)

2613 Flexibility of Express service gives you wide latitude in shipments. You can send almost anything anywhere with safety and speed. Pianos, peaches, gifts, power shafts, baby chicks, are handled as each should be with intelligent personal attention.

Animals and Pets are entrusted to Railway Express on a nation-wide scale by owners, breeders and exhibitors. They are treated with personal attention, fed and watered carefully, and delivered to their addresses promptly.

2626 Fast * Safe * Sure—You take no chances when you use Railway Express. Being nation-wide, with 23,000 offices from coast-to-coast, Railway Express can make prompt deliveries almost anywhere in America—in many localities, overnight—at astonishingly low rates.

2663 An Excellent Service for Installment-Sales Companies, Mail-Order Houses, Collection Agencies, etc.

Railway Express Collection service is of exceptionally great assistance to companies which sell on the installment plan, both retail and wholesale—household goods, refrigerators, washing machines, furniture, musical instruments, radios, automobiles, clothing * * * as well as slicing machines, clothes-pressing equipment, drink-mixing apparatus, etc.

Collection agencies, too, find this nation-wide collection service of Railway Express, with its 57,263 employes and 23,000 offices, an admirable extension to their own service.

EXHIBIT NO. XXXVII.

General Rules and Instructions (1948 ed.).

2909 The Agency also acts as Agent for sale of travel services, American Express Company Money Orders, Travelers Cheques, Foreign Money Orders, Unlimited Checks and other financial paper transactions.

Services for the Railroads and Others.

The Agency performs many classes of service for the Railroads, i. e., station work, pickup, delivery and transfer of L. C. L. freight and passenger baggage, U. S. Mail, etc. Additionally, services are performed for others as acceptance of telegrams, customs brokerage, and transfer of U. S. Mail to and from airports, all of which must be accorded proper attention.

EXHIBIT NO. XXXIX-A.

Circular No. 93-A—Commission.

[Circular No. 93-A contains over 33 pages of detailed instructions. For the sake of brevity only a small portion is reproduced here.]

3019 January 2, 1945.

Subject: Accounting Instructions.

To Commission Agents:

General.

Instructions governing receipting for, handling and delivery of express traffic effective July 1, 1938 provide for use, except as outlined below, of single entry combination receipt, Form 5082 for collect shipments, consisting of receipt to shipper, delivery sheet and abstract advice and

Form 5084 C for prepaid shipments, consisting of receipt to shipper, delivery sheet and abstract advice. The delivery sheet sections of the forms are to be affixed to shipments at forwarding office. Delivery sheet is to be detached from shipment and completed at destination office.

It is essential that original and all copies of receipt be legible and show all necessary information. Care should be exercised to see that date entered thereon is date on which shipment is actually received from shipper. When different date is shown, driver or other receipting employe should make necessary correction by changing forwarding date on face of Receipt, Delivery Sheet and Abstract Advice. If delivery sheet has been affixed to shipment, correct forwarding date should be entered on back thereof in space provided for Remarks.

Abstract advice should be separated from delivery sheet and label section. Delivery sheet should be folded over label section and carefully and securely pasted on shipment.

Delivery sheets should not be pasted over C. O. D. label, lot shipment label, or other labels or marks on shipments, or on exposed parts of merchandise such as crated furniture, etc.

If shipment is of such nature that it is not possible to readily affix delivery sheet and label section thereto, Form 201, Label Tag, should be attached to shipment and delivery sheet parts pasted on tag. Such tags should be attached also to shipments packed in ice, bales, metal bars, castings, trunks, valises, hand bags, etc.

Exceptions:

(a) Money Shipments: See paragraph 11.

(b) Carload Shipments: See paragraph 12.

(c) Air Express Shipments: See Operating and Accounting Departments Joint Circular, General Accounting Department 119-B.

(d) X Label Shipments: See paragraph 10.

Section 1.

Forwarded Business.

For complete description of labels and their use see General Rules and Instructions, Rules 45 to 64 inclusive.

1. Collect Shipments.

(a) Single entry collect receipt Form 5082 is intended for general use in receipting for merchandise classification shipments other than carloads on which charges are to be collected at destination office. Form 5082 is bound in books of fifty and is in three parts, viz:

(1) Receipt to shipper.
(2) Delivery sheet to be affixed to shipment.
(3) Abstract Advice.

When preparing the forms carbon paper should be inserted between parts 2 and 3.

(b) All parts of form should bear complete description of shipment. In every case weight and declared value marked on shipment and class or tariff number should
3020 be shown on the form so that proper charges may be collected at destination. Value and express charges should be entered on abstract advice and delivery sheet sections after receipt section has been detached and before delivery sheet section is affixed to shipment. Where this cannot be done value and express charges should be entered on abstract advice section only.

(c) To insure the collection of proper charges at destination the value and express charges and tariff number should be shown on abstract advice and delivery sheet covering each shipment moving under commodity tariffs, pound rates, third class rates, higher than first class rates, and paid in part shipments. See Traffic Department Circular 12.

(d) Shipments of second class matter forwarded collect should be weighed if ice or dry ice is used so that charges may be computed with allowance for weight of ice. Gross and net weights should be shown on face or back of delivery sheet and on abstract advice. It will be necessary also to weigh shipments of live fish in tanks, barrels or cans, live poultry and pigeons and other commodities where classification provides actual gross weight at time of shipment is to apply. Actual gross weight should be shown on face or back of delivery sheet and on abstract advice.

(e) Weight, rate, value and express charges should be shown on abstract advices and delivery sheets covering shipments destined to Canada.

(f) Month should be indicated by name or usual abbreviation, not by numeral. Name of state should be written out sufficiently to avoid confusion. See General Rules and Instructions, Rule 13.

(g) For a C. O. D. shipment enter amount of C. O. D. on all parts of form in space provided. If "C. O. D. Service Charge" is not to be collected from consignee write "No" in "C. O. D. Service Charge" space. If to be collected from consignee, write "Yes."

(h) For instructions pertaining to preparation and handling of Form 7175, Brief of Information for C. O. D. Shipments, see General Rules and Instructions, Rules 416 to 426.

ORAL ARGUMENT BEFORE EXAMINER FUNK.

(October 6, 1954.)

3508 Examiner Funk: The merchant agent is the official representative of the Railway Express Agency in his locality is he not?

Mr. Long: That's right, no question about it.

* * * * *

3519 Examiner Funk: Mr. Long, you will recall that during the early days of the hearing, some of the individuals who were then referred to as joint railroad-express agents were still considered as merchant agents under your earlier definition?

Mr. Long: Yes, that is true—wait a minute, there are some merchant agents who have full-time employment with the railroad, but in those cases, such as that Dehoff case in Maryland, there the agent is a full-time employe, I think he is also a member of the telegraphers. The agency, however, is operated in a store, which is operated, in turn, by a partnership, and Dehoff is one of the partners. Dehoff evidently spends his working time on his job in the railroad, and his partner takes care of the store and the express agency.

* * * * *

3523 Examiner Funk: Mr. Long, let's go back to something we were talking about a little while ago. Did I understand you correctly to say that it is possible for a merchant agent, without a break in service, to be reclassified, for instance, to an exclusive commission agent?

Mr. Long: I didn't say that merchant agents may be reclassified; I did admit that a merchant agent might accept a position with the Railway Express Agency, in which event he would be classified as an employe in that position; that is what I said.

Examiner Funk: Mr. Long, if a man is called a mer-
ant agent up to a certain date, at the same locality, with-
t any break in service, and then becomes an exclusive
mmission agent, would there be any change in the type
service rendered at that agency?

Mr. Long: No change in the specifications as to the
ork, practically none. Let's see, I believe there wouldn't
any change in the specifications; I am pretty sure that
what the record shows.

Examiner Funk: There are these cases in your exhibits
here a man will be listed for a certain length of time as
merchant agent, and then the city is no longer listed in
e merchant agent exhibit. However, if we look in your
t of agents issued January 1953, we find him listed as a
ntract or exclusive agent or, as in the case of Warren,
hode Island, as a salaried agent.

Mr. Long: That is possible. Tomorrow I might go out
d get a job helping a farmer, I can work outdoors then.
t there is nothing in the law that prohibits me from
ing it, that prohibits any contractor from taking em-
oyment as an employe for the Railway Express Agency
anybody else.

* * * * *

30 Examiner Funk: Then there is also the type of
case, Mr. Long, where a man is listed in the exhibits
a merchant agent, beginning as of a certain date, al-
ough he has been reported by the Express Agency to
r bureau of wage and service records for periods before
e date he first appears in your exhibits as a merchant
ent. Could it be said that such an individual has been
classified downward?

Mr. Long: It is not a reclassification, it is a change;
is a change from an employe status to that of an inde-
endent contractor, possibly.

Examiner Funk: Then the road runs both ways; that s, a man may be changed from merchant agent, for instance, to exclusive commission agent, and likewise from xclusive commission agent to merchant agent. Is that rue?

Mr. Long: Beg your pardon?

Examiner Funk: Is it true that it is possible for a merchant agent to change to an exclusive commission agent, and also for an exclusive commission agent to change to a merchant agent?

Mr. Long: Certainly, it is possible; there isn't any question about it.

• • • • •

PETITIONER'S ORAL ARGUMENT BEFORE THE BOARD.

(June 28, 1956.)

3859 Mr. Long.

• • • • •

3865 • • • Now, Mr. Burns testified that these eighteen employees were his employees; they were hired and they were discharged and their wages were controlled exclusively by him without any supervision on the part of the Express Agency whatever. In fact, those eighteen employees were members of one of Mr. Lewis' unions—the name of which is in the record and the name of which

3866 I do not recall at the present time—but that union had nothing whatever to do with Railway Express Agency or with any employer in the industry. Any negotiations with respect to working conditions, with respect to wages, was not conducted by the Railway Express Agency. The Railway Express Agency would not even have any notice of such negotiation; such negotiation would be had between

Burns, the employer, and the representative of the
n.

• • • • •

During the course of these proceedings it was
found that there are some variances from the defini-
of joint agent and from the definition of merchant
t, and these have been brought about by historical
rs largely. They have been brought about largely by
on of these factors. Express Agency has established
xclusive commission agency in a town. The business
when the agency was established has been sufficient
y the exclusive commission agent a fair living. Busi-
has declined, and eventually there was insufficient
ess there to permit the exclusive commission agent to
earn a living from his express business. In such
cases he has sought, and gained, approval from his
superintendent, or his supervising express officials
some work in addition to his express work, but the
tion whereby Express Agency controlled the premises,
r by ownership or rental, continued. Now, that ex-
e commission agent had changed a trifle; he had
ged, in fact, he had taken on some outside work, but
ay Express Agency still continued to control the
ises. There was a recognized employee at the instance
s service for Railway Express Agency.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 11924

RAILWAY EXPRESS AGENCY, INC.,
Petitioner,
vs.
RAILROAD RETIREMENT BOARD,
Respondent.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS, RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenors.

Petition for Review of Order of the Railroad Retirement Board.

REPLY BRIEF AND SUPPLEMENTAL APPENDIX THERETO, OF PETITIONER, RAILWAY EXPRESS AGENCY, INCORPORATED.

U. S. C. C. A. 7
FILED
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Intervenors.

Petition for Review of Order of the Railroad Retirement Board.

REPLY BRIEF OF PETITIONER, RAILWAY EXPRESS AGENCY, INCORPORATED.

The Statutory Definition of Employee.

For convenience we repeat that under the statute an employee is one who "is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service" (B. Br.* 45).

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* In making references Express Agency will use the following:

1. For Appendix to Petitioner's Brief "A."
2. Appendix to Respondent's Brief "R. A."
3. Appendix to Petitioner's Reply Brief "Reply A."
4. Board's Brief "B. Br."
5. Intervenors' Brief "Int. Br."

The Board states that "while the statutory test does not differ substantially from the common-law tests stated in many of the cases it is nevertheless in substitution therefor" (B. Br. 46). And the Board further states "it accepts the aid they (the common-law tests) offer in determining the meaning of the statutory test" (B. Br. 49).

Express Agency urges that the Board must accept the aid the common-law tests offer in determining the meaning of the statutory definition. That definition does not call for any expertise of the Board. Its language "but codifies the common-law rule of master and servant." *Nashville C. & St. L. Ry. v. Railway Employees' Dept., etc.*, 93 F. 2d 340, 342 (1937). Where, as here, words have a clear meaning in the common law, that meaning should be attributed to them. (See Express Agency's main brief, pages 26 through 32.) *Party Cab Co. v. United States*, 172 F. 2d 87, 92 (7th Cir., 1949), cert. denied, 338 U. S. 818.

But in reality the Board declines to interpret the statutory definition in the light of the common-law tests because it declines evidently to accept those tests which bear upon the right to control as outlined by Judge Major in *Williams v. United States*, 126 F. 2d 129, 133, cert. denied, 317 U. S. 655. See Express Agency's main brief, page 33. The Board attempts, by its own interpretation, to accomplish that which in 1946 it failed to do through Congressional legislation, that is, to bring under the Acts everyone who performs any work which is integrated into a carrier's transportation service. See Examiner Funk's report, adopted by the Board (A. 628-644, particularly 638). As said by the Supreme Court in *Addison v. Holly Hill Co.*, 322 U. S. 607, at 618:

> "Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.' *Kirsch-*

baum Co. v. *Walling*, 316 U. S. 517, 522. To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation."

The Basic Facts Relating to the Common-Law Test of Control Are Undisputed; Their Import Is.

The caption is the first sentence in Express Agency's main brief in the last paragraph on page 25. The Board seems to take issue therewith (B. Br. 27, 31). But let us examine the Board's brief in the light of the facts bearing on the basic test set forth in *Williams* v. *U. S.*, 126 F. 2d 129, 132, cert. denied, 317 U. S. 655. See Express Agency's main brief, pages 33-35. We shall give each fact its test number as set forth at pages 33 and 34 of Express Agency's main brief.

At page 24 of its brief, the Board admits that "non-exclusive commission agents," which term includes merchant agents, (1) have the right to hire and discharge persons doing the work and (2) prescribe the method and determine the manner of payment of the workman.

At page 24 of its brief, the Board admits that (3) "merchant agents often are principally engaged in business or trade, and have investments in their business." The Board also correctly states on page 24 of its brief that some merchant agents are "wage earners, housewives, farmers, etc." The point is, however, that the comparatively few merchant agents who are not merchants or tradesmen may engage in any business they see fit, and do operate the express business as their own business, furnishing the place where the work is done, the telephone, any advertising and soliciting that may be done, and oftentimes employing others to do the work or assist them in doing the work (A. 381, 385-386, 389-391, 393-397, R. A. 117).

The Board at page 60 of its brief urges that the merchant agent was not in an independent calling insofar as express is concerned and, therefore, the fact that he may have been engaged in another business or businesses had no bearing on the question of control. In support of its position, the Board cites *Pittsburgh Valve Foundry and Construction Company* v. *Gallagher*, 32 F. 2d 436. In that tort action, the defendant was found to be the employer of the individual responsible for the injury caused by the negligent driving of said individual's automobile. The driver was a laborer in the employ of the defendant and had been engaged by the defendant to transport himself and other laborers to and from the place of work in his own automobile. The negligent driver had no other business or occupation.

The merchant agents conduct their express business as a part of their regular business. For example, Merchant Agent Burns departmentalized his business, placing retail feed and express in one department (A. 279). Merchant Agent Jordan also departmentalized his business (A. 305). When Burns' contract with Express Agency was canceled, he and his employees continued to work and not one of them needed or was entitled to unemployment benefits under the Railroad Unemployment Insurance Act. Merchant Agent Horton in addition to his express work was agent for bottled gas in Hancock County, sold bus tickets, operated a gas station and was in the coal business (A. 231, 243-244). It could hardly be said that Mr. Horton was an employee of the bus company for social security purposes, was an employee of the bottled gas company for social security purposes, was a self-employed businessman for social security purposes, and at the same time was an employee of Express Agency for the purpose of the Railroad Security Acts. Logically, Merchant Agent Horton was in business for himself with respect to all of his activities and those whom he hired and paid were his employees rather an the employees of the bottled gas company, the Express gency or of any person or company other than Merchant gent Horton.

The Board does not deny and halfheartedly admits on ages 22 and 23 that the merchant agent (4) furnishes ome of the tools and materials with which the work is one such as the motor vehicle where pickup and delivery ervice is furnished, business machines and scales (A. 232, 33, 276, 278, 288, 314, 359).

The merchant agent (5) has control of the premises here the work is done (A. 237, 271, 272, 305, 308, 321, 64).

Express Agency urges the importance of this last item ecause if the agreement with the merchant agent is broken, Express Agency loses the place where the express work is lone and may find it difficult to locate another where the ommunity and the business do not warrant the construcion or rental of its own quarters. It is one of the imporant factors distinguishing the merchant agent from all ther agents because all other agents operate the express ffice and warehouse room on premises controlled by Express Agency either by ownership or lease in its name or by reason of contract with the railroad, pursuant to which Express Agency engages the services of the joint agent. The Board at page 62 of its brief and the Intervenors at page 7 of theirs urge that there is no difference, insofar as control of premises is concerned, between the merchant agent and the joint agent. Let us compare what the Board and Intervenors' counsel said while acting as Board's examiner and what they say now.

Mr. Schoene as counsel for the Intervenors says at page 7 of his brief:

> "In the first place, this does not differentiate the merchant agent from the joint agent; it is true that

the railroad rather than the joint agent owns the premises where the joint agent works but the agent is in control in his capacity as railroad agent and the availability of the premises for express business is dependent upon the railroad agent being engaged as express agent."

But Mr. Schoene as Examiner for the Board in his first report, adopted by the Board, said (A. 70):

> "That the use of the railroad companies' premises by The Express Agency is obtained by The Express Agency itself by virtue of its own written agreement with the railroad company, to which the joint agent is not a party is shown by the following excerpt from Article IV of the 'Express Operations Agreement' (Exhibit 1) between the Express Agency and the various railroad companies:
>
> > 'Sec. 1. In cases where an employee of the Rail Company acts as agent for the Express Company, *the Rail Company,* to the extent that it reasonably can, *shall allow the Express Company* the use of a portion of the station buildings now existing or which may hereafter be erected, including appurtenances and conveniences such as heat, light, and use of telephone at station without charge to the Express Company, except as otherwise provided in Section 2 of this Article, provided that the Express Company shall pay any additional toll charge made by the Telephone Company.'"
> >
> > (Italics supplied.)

The Board in its brief at page 62 says:

> "Petitioner argues that when the merchant agent quits Petitioner loses the place where the work is done and the instrumentalities furnished by the merchant agent (Pet. Br. 38). This is also true when a joint agent quits; the premises he occupied, and the instrumentalities he furnished, must also be replaced. There is no difference.

at the Board in adopting Examiner Schoene's second
rt said (A. 164, 165):

> "When a vacancy occurs in the position of agent at a point where the railroad agent usually acts also as express agent, the railroad company fills the position of railroad agent in accordance with seniority rules. However, applicants for the position know that express business is usually handled by the agent in this position, and, in estimating the compensation of the position, take into consideration the expectable express commissions as well as the compensation to be received from the railroad. The fact that the position usually involves the handling of express is, in some instances, shown by the agreement between the railroad company and its agents, and in some instances, by the bulletin published by the railroad company advertising the position, which bulletin may or may not indicate the average express commissions at the point involved. The Express Agency does not negotiate directly with the individual applying for the position nor does it participate in determining to whom the position shall be assigned. When the newly appointed individual reports for service, the railroad company checks him in as railroad agent. At the same time, the Express Agency, through its route agent, checks him in as express agent, and, unless his last previous employment included service as express agent, has him sign the 'Application for Employment,' etc., as stated in the Original Report."

Thus Express Agency does not lose the benefit of the
lroad station when a joint agent quits. There merely is
hange in agents brought about by reason of the fact
t the joint agent was primarily employed by the rail-
d and his job is subject to seniority and subject to bid
the basis of the seniority roster.

t is true that Express Agency at one time urged that
ich Mr. Schoene now urges, but the examiner and the
ard ruled against the Express Agency on that point and

e Express Agency has agreed because of that factor and hers that joint agents are employees insofar as this litiation is concerned.

The General Rules and Instructions.

The Board relies upon the General Rules and Instrucons (Exhibit XXXVII, R. 2906-3016), and urges that xpress Agency's business is such that merchant agents ust comply therewith as employees (B. Br. 54-58). Exress Agency urges that only those of the General Rules nd Instructions which are in the nature of specifications the work or of suggestions, such as some safety rules, oply to merchant agents and their employees.

The application for employment from which the Board uotes at page 15 of its brief and the General Rules and structions from which the Board quotes at page 19 of its ief do not specify those rules which apply or those which not apply to merchant agents. It is obvious from a ere reading of the rules themselves that all of them could ot apply to merchant agents. It is submitted that the cord fully establishes that purely employee rules do not oply to merchant agents. For example, the record shows at merchant agents and their employees and assistants re not furnished with a badge (A. 393). Therefore, Rule 28 could not apply to merchant agents. That rule reads A. 393, 394):

> "Employees who receive and deliver goods elsewhere than at the Company's offices must wear the Company's regulation badge on the front of their caps while on duty. If badge is lost, stolen, or damaged, prompt report must be made to the official who furnished it."

Similarly, the merchant agent furnishes the telephone A. 239, 275, 279, 305, 324, 386). Obviously and as a matter

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rd (A. 397), Rule 920 does not apply to the merchant
That rule reads (A. 397):

> “The telephone is furnished for the Company's busi-
> ss; employees should not be permitted to use it for
> rsonal matters except in case of emergency.”

ilarly, Rule 798 (A. 327), Rule 828 (A. 393, 394), and
31 (A. 347, 348, 395) do not apply to merchant agents.

his point, it is of interest to note the following testi-
of typical Merchant Agent Jordan who appeared at
aring in response to notice and without solicitation
part of Express Agency (A. 302, 316):

> “A. To get this thing clear, we operate Jordan's,
> d anything that is in the interest of Jordan's is
> kay, but when it isn't, it doesn't function. We are
> ainly Jordan's. We handle express business as a
> de line.”

pages 16 and 17 of the Board's brief, reference is
to certain safety rules. These apply to employees
ndependent contractors. As against an employee,
er, Express Agency could “fit the punishment to the
” in the event of an infraction. In the case of a
ant agent, Express Agency, as it could with any con-
r, could only cancel the contract if the contractor
d to follow such safety regulations. In canceling the
act, Express Agency would lose the benefit of the
where the work was performed, of the tools furnished
merchant agent, and of the workers furnished by
erchant agent.

se safety rules are good rules whether they be con-
d directive as against employees or suggestive with
et to independent contractors. Rules 1140 through
(R. 2998) under heading “Avoiding Traffic Acci-
” are also good rules which any motor vehicle driver
do well to follow.

f much greater importance and of considerable, if not clusive, significance are the following facts: Typical rchant Agent Jordan carries workmen's compensation urance on all of his employees. Express Agency makes contribution toward the premiums on such insurance has nothing whatever to do therewith (A. 311). Typi- Merchant Agent Horton has "compensation" on all of employees and testified that he would pay any claim injury to any one of his employees whether the work s on express or otherwise (A. 245) Typical Merchant ent Burns pays extra insurance on the truck he uses to ndle express because of the fact that express is handled rein (A. 276, 290, 291). Express Agency makes no con- bution whatever toward the premiums for such insur- ce (A. 300). The testimony of Merchant Agent Burns s not solicited by Express Agency. His direct examina- n was conducted by counsel for the Clerks (A. 265, 528).

The Interstate Commerce Commission issues regulations l specifications for the transportation of dangerous ex- osives and Express Agency and its employees must com- y therewith (A. 387). That does not mean, however, that press Agency or its employees are employees of the terstate Commerce Commission. Each state and each mmunity has laws which are in the nature of safety gulations applicable to all citizens; but that does not ean that citizens are employees of the state. Our complex ay of life is such that not one of us may escape the ap- ication of safety rules in almost every phase of our ex- ence. Agents of Express Agency must comply with rules the railroad while on railroad premises (B. Br. 8; R. A. , Exhibit 1, Article XIII), but agents of Express Agency, her than joint agents, are not employees of the railroad.

At pages 20 and 21 of their brief, the Board refers to rtain testimony of typical Merchant Agents Schreiber

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irns. With respect to Burns, attention is invited to 9 through 13 of Express Agency's main brief.

respect to Schreiber, attention is invited to his ony as follows. He had been merchant agent since A. 320). He was 74 years of age in 1948 and retired when his son took over the operation of his father's ore and succeeded him as merchant agent (A. 321, A. 25).

947 Mr. Schreiber's gross drug business amounted ,000.00 from which his net was between $6,000.00 7,000.00. His express commissions amounted to 39 (A. 354). The approximate value of his entire ss was $50,000.00 (A. 321). The only payment made Express Agency for or in connection with the ex- office is 10% commission paid to Mr. Schreiber (A. 22).

Schreiber owned the building and designated the therein where the express work was performed. He hed the employees who performed the work, the [illegible], light, heat, scales, a handtruck, and everything those furnished by the Express Agency which were d forms, sealing wax, glue, a metal stamp, and tariffs 20-325, 353, 356-359).

Schreiber's telephone is listed in his name only. ss Agency does not have a telephone listed in its in Tell City where Mr. Schreiber has his merchant y (A. 324).

Schreiber has in his employ three regular clerks, art-time clerk, and Mr. Schreiber's son. Whereas all oyees at times work on express, his son does the major of express work, one employee does quite a bit of it, girl employee is familiar with express work. How- for the purposes of the Acts, Mr. Schreiber reports

his son and himself as receiving compensation for
ress work (A. 322, 323).

r. Schreiber does not report to or consult Express
ncy as to who among his employees may do express
k, and he delegates such work as he sees fit wholly in-
endent of Express Agency. Mr. Schreiber never con-
ed Express Agency when he hired or fired any em-
ee who did or might do express work (A. 322, 323, 353).

r. Schreiber cannot remember ever signing an Applica-
for Employment blank. None of his employees ever
ned such an application (A. 353, 354, 359).

r. Schreiber performs the express work entirely upon
premises. Express is brought to and from his express
e by a truck. He meets no trains and performs no
up and delivery service (A. 324).

r. Schreiber and not Express Agency decides who
ong the patrons of his business, including drugs and
ress, shall receive prior service (A. 332).

r. Schreiber advertises and solicits express business
n his own responsibility and entirely independent of
press Agency (A. 335).

the express business were taken away from him, Mr.
reiber would not rent space on his premises to Express
ency for the conduct of express business (A. 356).

Mr. Schreiber took any counterfeit money in payment
xpress charges, that would be his loss (A. 361).

r. Schreiber accepts checks every day from his patrons
ayment of express charges and such checks are received
is own responsibility and drawn to his order (A. 323).

e followed Rules 827 and 829 in the General Rules and
ructions referring to personal conduct and deportment
mployees and polite and courteous treatment of patrons
use they were good rules to follow in his own drug

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siness as well as his express business (A. 351, 352,

chreiber or any of his employees does not wear
or uniform (A. 324).

31 did not apply to him. That rule reads (A. 395):

> Drinking intoxicating liquor, gambling or the use
> rofane or vulgar language while on duty, or ex-
> ive use of intoxicating liquors while off duty, will
> ufficient cause for investigation and dismissal."

chreiber could go on a spree for three months and
Agency would never know anything about it be-
s boy would take care of the business; and if his
uld go on such a spree with him, the express work
ill be taken care of by his employees (A. 347, 348).

id in *Universal Camera Corp. v. Labor Board*, 340
4, at 488:

> The substantiality of evidence must take into ac-
> nt whatever in the record fairly detracts from its
> ght."

er may the courts consider evidence in isolation.
s in amending the National Labor Relations Act
d a mood to the end that there might no longer
ions such as *Wilson & Co. v. Labor Board*, 126 F. 2d
. C. A.—1942), cert. denied, 316 U. S. 699, for which
tice Evan Evans so ably apologized after the Su-
Court reversed him in *Foote Bros. Gear & Mach.*
. *National Labor Relations Board*, 114 F. 2d 611,
reversed and remanded 311 U. S. 620. See *Univer-*
era Corp. v. Labor Board, 340 U. S. 474, 486.

The Merchant Agents Who Testified Are Typical.

At pages 59-63 and 64 of its brief, the Board urges that the merchant agents who testified are not typical. They were presented by Express Agency as typical.

Superintendent Lace heard the testimony of Merchant Agents Horton, Westfall, Schreiber and Jordan. He testified that on the basis of his 26 years as an express employee he was of the opinion they "are typical of the general pattern" of merchant agents (A. 377, 421).

Mr. Hall, Assistant to an Operating Vice President of Express Agency at Chicago, who began his express career in 1904, testified that he was present when Merchant Agents Schreiber, Jordan and Horton testified and that their merchant agencies "were characteristic generally" of merchant agencies in the entire system of Express Agency, "Mr. Horton's in particular" (A. 487).

Examiner Funk has not once stated in his report that any one of the witness merchant agents was not typical.

The Clerks represent most of the employees of Express Agency. Mr. Morgan, Vice President of the Clerks and Mr. Crawford, General Counsel of the Clerks, conducted the direct examination of Merchant Agent Burns (A. 265-269, R. A. 89). Messrs. Morgan and Crawford said in their brief before the examiner:

> "These merchant agents, whose names appear in the record, are typical of the general pattern of merchant agents who perform work for the Agency as merchant agents" (R. 3294).

The Board's contention that the merchant agent witnesses are not typical seems to be based on only two grounds of relatively minor importance, to wit. (1) that the earnings and investments in their business or businesses were not typical, and (2) that with respect to the relatively few merchant agents who are not merchants or tradesmen, it is common for them to do the express work themselves or with the aid of members of their families and or neighbors. It is not disputed that such family members and neighbors are selected and paid by the merchant agents without any supervision by, and often without the knowledge of, Express Agency (B. Br. 59, 63, 64).

At page 24 of its brief, the Board states Superintendent Lace made a survey of merchant agents in his territory from which he learned the investments of such merchant agents in their business and that five ranged from $1,000.00 to $4,000.00. The Board could have been more helpful if it had given the complete and correct story.

First the Board knew or should have known that the church janitor, Roscoe Wilson, and Wilma Mehle were eliminated as merchant agents by a narrowing of the definition to exclude those who had the express office and warehouse on premises controlled by Express Agency or a railroad (A. 551, 552). Mr. Wilson operates in a railroad building in Chenoa, Illinois, for which the Express Agency pays the rental. Wilma Mehle operates in a building at Sterling, Illinois, for which Express Agency pays the rental (A. 408, 411, 413, 414).

Superintendent Lace had 19 merchant agents in his division. As between the merchant agent and Express Agency, all of them controlled the premises on which was located the express office and warehouse. Fourteen of these 19 were merchants or tradesmen, one was an employee of a bus line, one was connected with a greenhouse, and three were postmasters (A. 406-419). Superintendent Lace was able to ascertain the investments in their business of 8 of the 14 businessmen. They are as follows:

Agent	Business	Investment	Reference
Korff	Grocery	$ 3,000.00	A. 406
McCartney	Dray Line	10,000.00	A. 407
Simpson	Retail hardware, furniture, undertaking establishment	70,000.00	A. 407
Sterrenberg	General Merchandise	8,000.00	A. 408
Davison	Grocery & Notions	2,500.00	A. 411
Farmer	Grocery	4,000.00	A. 412
Prim	Drayage Line	1,000.00	A. 412
Schaffer	Drugstore	10,000.00	A. 413

Among those merchant agents from whom Superintendent Lace was unable to learn their investment was Mr. Westfall, a druggist, who was one of the merchant agents who testified (A. 362-376). His gross express commissions amounted to only $8.00 to $10.00 per month (A. 363). His gross annual income from his drug business was $50,000.00 a year (A. 370).

Superintendent Huff had in his division 39 merchant agents, of whom 31 were storekeepers or businessmen, such as garage owners and operators of dray businesses (Exhibit 6a, R. 804-806, A. 116-125).

As spelled out by the practice followed, only those rules which are in the nature of specifications of the work apply to merchant agents. Compare *Reynolds* v. *Northern Pacific Ry. Co.*, 168 F. 2d 934, 940. As said by the court in this last cited case "the question necessarily must be viewed in the light of *United States* v. *Silk*, 331 U. S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757; *Bartels* v. *Birmingham*, 332 U. S. 126, 67 S. Ct. 1547, 91 L. Ed. 1947, 172 A. L. R. 317, and the other recent expressions of the Supreme Court dealing with the sound determination of enterprise status and employer-employee relationship." See Express Agency's main brief 40-47.

The Findings Proposed by Express Agency.

In its main brief, Express Agency in Point VI sets forth eleven findings which it contends are established by the record. These findings also were suggested in Exception No. 15 of Express Agency's Exceptions to the Recommendation of Examiner Funk (R. 3818).

The Board urges under "Summary of Argument" at page 31 of its brief that "the findings petitioner claims in his brief should have been made are irrelevant, or are inaccurate, or are unnecessary." But the Board fails to indicate in its brief those of such findings which it considers as irrelevant, inaccurate or unnecessary except on page 63 of its brief the Board urges (1) that the fact that merchant agent furnishes the building or quarters where the express business is conducted is of "questionable relevance" and (2) that the fact Merchant Agent Burns has an investment of up to $100,000.00 in his business and an income of up to $30,000.00 is "very misleading."

With respect to the first item it is submitted that Express Agency has shown that the fact the merchant agent controls the premises is quite material to the main issue.

With respect to the second item attention is invited to the fact that typical Merchant Agent Jordan also had an investment of $100,000.00 in his business and had a gross income from all of his business of $3,000.00 per month (A. 303, 305). Also the record shows that Merchant Agent Simpson had an investment in his business of $70,000.00 (A. 407). Of the eight agents concerning whose investments in their business Superintendent Lace was able to discover four or one-half had investments of $8,000.00 up to $70,000.00 (A. 406-413).

Social Reasons Do Not Require Application of the Acts to Merchant Agents and Their Employees.

The Board and the Intervenors attempt to persuade the Court to the view that there are social reasons which should require an interpretation bringing within the Acts evidently all those who perform any service integrated into a carrier's operations. Such, of course, is not the fact. Compare *Reynolds* v. *Northern Pac. Ry. Co.*, 168 F. 2d 934, cert. denied 335 U. S. 828. The merchant agents and their assistants and employees are covered by the Social Security Act. To bring them under the Railroad Security Acts would merely cause confusion. The social conditions which were involved in the Fair Labor Standards Act cases such as *Western Union Tel. Co.* v. *McComb*, 165 F. 2d 65, referred to frequently by the Board, are not present here. In this last cited case, the 6th Circuit referred to the case of *Walling* v. *American Needle Crafts*, 139 F. 2d 60 as a guidepost in the application of the Fair Labor Standards Act and said of the opinion in that case:

> "The opinion pointed out the principle that the act is designed to implement a public social, or economic policy through remedies unknown to and often in derogation of the common law; and that in the status of the case the court was not concerned with the question of whether a master-servant relationship existed under otherwise applicable rules of the common law."

Furthermore, the definitions in the Fair Labor Standards Act are far different from those in the Railroad Acts. The Fair Labor Standards Act provides, Section 203, Title 29 U. S. C.:

> "(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a state, or any labor organization (other than when acting as

an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(e) 'Employee' includes any individual employed by an employer."

Conclusion.

Merchant agents, their employees and assistants are independent contractors and the Railroad Retirement Board hould be directed to refund the contributions Express Agency has made with respect to the express earnings of aid agents, their assistants and employees.

Dated: October 14, 1957.

Respectfully submitted,

Fulmer Long,
Elmer F. Slovacek,
Attorneys for Petitioner.

Fulmer Long,
Elmer F. Slovacek,
612 S. Clinton Street,
Chicago 7, Illinois.

APPENDIX.

98

EXHIBIT NO. LL.

(Letterhead of Puget Sound Navigation Company,
Seattle 4, Washington.)

November 22, 1946
File 9-87

ilway Express Agency
gional Accounting Department
icago, Illinois

Attention: S. P. Victor, Auditor of Disbursements.

ar Sir:

)ur letter of October 11, 1946, File 9-87, read as follws:

"Our file concerning R. R. U'Ren, Social Security Acunt Number 534-09-6940, Agent Port Townsend dates ck to year 1943, and as yet has not been satisfactorily ncluded.

For several years our commissions were reduced because deductions made in error by your company to apply connection with the Railroad Retirement Act in behalf Mr. U'Ren. As you have been previously notified Mr. Ren was and is an employee of Puget Sound Navigan Company and accordingly erely represents his emoyer when performing your company's duties. All comssions received therefrom accrue and are turned over the Puget Sound Navigation Company.

As we are extremely anxious to conclude this old subt, would you please arrange refund of the erroneous ductions that were made account Railroad Retirement t."

As we have had no answer from the above letter, we would preciate early reply as to when refund will be made.

Yours very truly,
H. C. Strassburger
Treasurer

AO:mb

3109 EXHIBIT NO. LII.

Affidavit.

State of Washington, }
County of King. } ss.

Alex M. Peabody being duly sworn on oath deposes and says:

That he is the President and Chief Executive Officer of the Puget Sound Navigation Company, a corporation, and as such has full and complete jurisdiction over all the company employees, and

That R. R. U'Ren is the company's Agent at Port Townsend, Washington and as such is a full time paid company employee on a monthly salary basis, and

That his duties include the complete handling of all business of the Railway Express Agency at Port Townsend, and

That all income derived from the handling of the Express Company business is remitted to the Auditor of the Puget Sound Navigation Company, General Offices, Seattle.

Alex M. Peabody.

Subscribed and sworn to before me this 6th day of July, 1949.

Fred Hambly,
Notary Public for the State of Washington residing at Seattle.

(Seal)

17 (Letterhead of Railway Express Agency,
Chicago 7, Ill.)

November 29, 1954

ner M. Funk, Examiner
ilroad Retirement Board
4 Rush Street
icago 11, Illinois

Re: Jurisdictional Docket No. 2-2A

ar Sir:

In accordance with your authorization granted at my quest made at oral argument before you in the above-titled matter October 6, 1954, I enclose affidavit of Charles Schreiber executed November 12, 1954, for inclusion in record.

As you know, I requested such authorization following ur reference during the course of the argument to the llowing appearing on page 18 of The Express Messen r issue of November-December, 1951:

(Name) C. A. Schreiber (Appointed) Agent (Location) ll City, Ind. (Previous Position) Clerk (Entered Serv-) 1940.

I understand you were of the opinion that this quote om the said Messenger was in conflict with the evidence th respect to Merchant Agent C. D. Schreiber of Tell ty.

You know that this same issue of the Messenger at page displays a picture of C. D. Schreiber with the following adnote:

> "Supt. J. J. West (center) congratulates Agents C. D. Schreiber (left), Tell City, Ind., and B. D. Davis, Owensboro, Ky., as they retire."

18 As will be noted therefrom, the enclosed affidavit of C. A. Schreiber adds to the overwhelming weight the evidence that merchant agents are independent con- actors. I am sure it must dispel any doubt as to whether D. Schreiber was a merchant agent and as to whether

carried on and his son, C. A. Schreiber, now carries the express business at their drugstore as a part of eir own business as independent contractors.

Yours very truly,

L:ef Fulmer Long.

nc.

—Messrs. Robert Morgan
James L. Crawford
Lester P. Schoene
A. H. Burns
C. C. Harrison

---

319 RAILROAD RETIREMENT BOARD.

Before Examiner Funk.

ailway Express Agency, Incorporated
urisdictional Docket No. 2-2A

ell City
unty of Perry } ss.
ate of Indiana

Charles A. Schreiber being duly sworn deposes and says:

That he is the C. A. Schreiber described on page 18 of The Express Messenger" issue of November-December 51, as having been appointed agent at Tell City, Indiana, aving held the position of clerk and having entered serve in 1940. That he is the son of C. D. Schreiber whose cture is set forth in the lower right-hand corner of page of the same issue of "The Express Messenger."

That deponent is presently in full charge of the operaon of Schreiber Drug Store at Tell City, Indiana and is full charge of the Agency of Railway Express Agency, ncorporated, operated in connection with and in the same uilding with the said Schreiber Drug Store, and deponent as been so operating the Schreiber Drug Store and the gency of Railway Express Agency, Incorporated since

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1, 1951, deponent's father, C. D. Schreiber, having d as express agent and operator of said drug store June 30, 1951.

t deponent's father, C. D. Schreiber, conducted the ss business as Agent of Railway Express Agency, porated in his drug store many years prior to July 1, 1951, and as far back as deponent can remember and extending to and including June 30, 1951, deponent's father, C. D. Schreiber, operated the said store and deponent is informed that his grandfather d the Schreiber Drug Store in 1865.

t upon the retirement of his father, C. D. Schreiber, active business, deponent took over the operation of ther's drug store and his father's express business, Railway Express Agency, Incorporated recognizing hange designated deponent Agent as of July 1, 1951.

t immediately prior to July 1, 1951, deponent under ther, supervised the express business conducted at gency in the building occupied by Schreiber Drug and since July 1, 1951, deponent has supervised the express business in his own name.

t the relationship between Railway Express Agency, porated and the Agency conducting express business building occupied by Schreiber Drug Store is the as it was during the year 1948 and prior thereto and ontinued the same to the present time, except for ences in personnel such as the designation of deponent s Agent on the retirement of his father.

t since deponent has been designated Agent of Rail- Express Agency, Incorporated, he has at his sole ex- added an additional room to his drug store building e in handling express business.

t since he has been designated Agent for Railway ss Agency, Incorporated, deponent, at his sole ex- , has advertised express agency service in newspapers n the yellow pages in the Tell City Telephone Direc- and deponent also at his sole expense recently pur- l and installed at the building in which Schreiber Store is located a neon sign advertising Railway ss Agency transportation business, and the sale of ss money orders and traveler's cheques.

21 That the construction of the said room for express
business, the said advertising, and the said installa
n of the neon sign, all were done on the decision and
lgment of deponent without consultation with or author
tion by any representative of Railway Express Agency,
corporated.

That the said advertising coupled with deponent's
igence in conducting his express business has resulted
an increased return to him in the form of express com-
ssions.

That deponent has caused the name of Railway Express
gency, Incorporated to be listed in the telephone direc-
y in Tell City at deponent's sole expense.

That deponent, entirely independent of Railway Express
gency, Incorporated, controls the employes who perform
e physical work in connection with express business at
ponent's express agency, and deponent has the exclusive
ght to hire and discharge such individuals.

That deponent conducts the express business in his build-
g in which are located Schreiber Drug Store and the
gency for Railway Express Agency as his own business
bject only to instructions from Railway Express Agency,
corporated as to results.

Chas. A. Schreiber.

Subscribed and sworn to before me this 12th day of
ovember, 1954.

Mrs. Betty Jane Bender,
Notary Public.

Seal)

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JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

RECE
APR
ICE OF THE
EME COURT,

No. 908

RAILWAY EXPRESS AGENCY, INC.,
Petitioner,

v.

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS, AND RAILWAY LABOR EXECUTIVES ASSOCIATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Robert J. Fletcher,
Fulmer Long,
Nicholas F. Smith,
219 East 42d Street,
New York 17, New York,

Francis M. Shea,
Richard T. Conway,
734 Fifteenth St., N. W.,
Washington 5, D. C.,

Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No.

RAILWAY EXPRESS AGENCY, INC.,
Petitioner,
v.
RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS, AND RAILWAY LABOR EXECUTIVES ASSOCIATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, entered in the above-entitled case on January 9, 1958.

Opinions Below

The opinion of the Court of Appeals is set forth in Appendix A to this petition and is reported at 250 F. 2d 832. The order of the Railroad Retirement Board, B. O. 56-235, may be found at pp. 839-840 of the Appendix to Petitioner's brief in the court below. That order adopts as the Board's own the examiner's findings of fact, conclusions of law and reasons therefor. The examiner's report so adopte by the Board may be found at pp. 582-804 of the Appendi to Petitioner's brief.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C 1254(1). The judgment of the Court of Appeals, set fort in Appendix B to this petition, was entered on Januar 9, 1958.

Questions Presented

1. Are the so-called merchant agents, and their employee who contract with petitioner to operate railway expres agencies in a large number of small communities as a adjunct of their regular business or occupation, "employees" of petitioner for purposes of the Railroad Retirement Act and the Railroad Unemployment Insurance Act

2. Did the Congress in defining "employee" mean t adopt common law principles, which exclude mercha agents as independent contractors, or to provide a distin statutory test for determining the coverage of the Acts

3. Should the Court of Appeals have remanded the cas to the Railroad Retirement Board for reconsideration o the basis of the legal principles determined by that Cour rather than accepting as supported by substantial eviden a decision based upon different and erroneous legal pri ciples?

Statutes Involved

Railroad Retirement Act of 1937, 50 Stat. 308, as amende 45 U.S.C. 228a:

> (b) The term "employee" means (1) any individu in the service of one or more employers for compe sation . . .

> (c) An individual is in the service of an employer whether his service is rendered within or without the United States if (i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service. . . .

Railroad Unemployment Insurance Act, 52 Stat. 1094, as amended, 45 U.S.C. 351:

> (d) The term "employee" (except when used in phrases establishing a different meaning) means any individual who is or has been (i) in the service of one or more employers for compensation . . .
>
> (e) An individual is in the service of an employer whether his service is rendered within or without the United States if (i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service. . . .

Statement of the Case

This proceeding was brought to review a ruling of the Railroad Retirement Board. The Board held that so-called "merchant agents" and their employees engaged in handling express business for petitioner in a number of relatively small communities are "employees" of petitioner as that term is defined in the Railroad Retirement Act of 1937 and the Railroad Unemployment Insurance Act. The Board, therefore, denied petitioner's claim for a refund of more than $108,000, plus interest, in contributions made by petitioner to the railroad unemployment insurance fund which were based on the earnings of the merchant agents from their express business.

Petitioner operates a nation-wide express business. While land, air and water transportation are utilized in providing this service, petitioner primarily utilizes rail transportation pursuant to a Standard Express Operations

Agreement entered into with the railroads. This business is handled at the local level through more than 22,000 express offices or "agencies." Many of these agencies are operated by full-time employees of petitioner on property owned or leased by petitioner. In most localities, however, the available business is not sufficient to justify the maintenance of an operation of this nature. Petitioner has arranged with the railroads, pursuant to the Standard Express Operations Agreement, to have railroad employees operate express agencies on railroad property during their regular working hours in many of these communities. Some 16,000 of petitioner's agencies are operated by railroad employees, called "joint agents," under this arrangement. Where for some reason a joint agent cannot be or is not obtained to operate express agencies in these smaller communities, petitioner often has contracted with local merchants or others to perform that function. These agents are designated as "merchant agents."

Petitioner concededly is an "employer" as that term i defined in the Railroad Retirement Act of 1937, 45 U.S.C 228a-y, the Railroad Unemployment Insurance Act, 4 U.S.C. 351-367, and the Railroad Retirement Tax Act, 2 U.S.C. 3201-3233. All three statutes define "employer," and also "employee," in substantially the same manner They provide retirement and unemployment benefits, administered by the Railroad Retirement Board, to retire or unemployed "employees" of the employers. As an employer, petitioner is required by the Railroad Unemployment Insurance Act to pay contributions, based upon th compensation paid to its employees, to an unemploymen insurance fund. Similarly, petitioner is required by th Railroad Retirement Tax Act to pay an excise tax measure by the compensation paid to its employees. Petitioner i not required, however, to pay unemployment contribution or retirement taxes with respect to non-employees with whom it has relationships, such as independent contractors.

The persons engaged full time in operating local express agencies on property owned or leased by petitioner have always been regarded by petitioner as employees. The joint agents and merchant agents, however, have been considered to be independent contractors. In 1938, the Board, adopting the report of its examiner (P. A. 45-97)[1], ruled that the joint agents and merchant agents are employees of petitioner for purposes of the Railroad Retirement Acts (P. A. 97-99). After a hearing and a second report by the examiner (P. A. 161-199), the Board adhered to its ruling that the merchant agents are petitioner's employees with the exception that no ruling was made in "cases in which a company or other entity not an individual is designated as agent" of petitioner (P.A. 200-223).

Thereafter, petitioner has paid, under protest, unemployment insurance contributions and retirement taxes based on the earnings of the joint agents and the merchant agents from express business. On November 20, 1943, petitioner filed with the Board a claim for refund (R.A. 82-88) of the unemployment insurance contributions paid with respect to the joint agents and merchant agents, and also with respect to another minor category of agents called branch or limited agents and a miscellaneous group lumped into the category "all others." This claim for refund was supplemented from time to time to include contributions paid in subsequent years. Petitioner also filed suit in the District Court for the Southern District of New York against a Collector of Internal Revenue for refund of the retirement taxes paid with respect to such agents. That suit, and subsequent actions covering later periods, are now awaiting trial.[2]

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[1] The symbol "P.A." refers to the appendix to petitioner's brief in the Court below. The appendix to respondent's brief will be referred to by the symbol "R.A."

The Board, on June 23, 1948, reopened the earlier proceeding and set for hearing the issues raised in the claim for refund. At the opening of this hearing, petitioner waived its claim for refund with respect to the joint agents in consonance with an offer in compromise that petitioner had made in the New York cases (P. A. 230). The waiver and concession that the joint agents are employees was limited to this proceeding only. Subsequently, petitioner also waived the claim for refund with respect to the miscellaneous group of agents coming within the "all others" category because the amount involved was not sufficient to justify the expense and effort that would be required to prove the claim (P. A. 446). The examiner, in an extremely long report, recommended that the Board find that the limited or branch agents are not "employees" of petitioner, but that the merchant agents and their employees are petitioner's "employees" within the coverage of the Acts (P. A. 582-804). The Board adopted the examiner's report for its findings of fact, conclusions of law, and opinion in the proceeding (P. A. 839-840).

The examiner's findings of fact concerning the relationship of petitioner and its merchant agents (P. A. 602-615) are not very clear because he devised categories of his ow to describe the agents rather than following those used i the claim for refund, the notice of hearing, and in the testimony and other evidence (see P. A. 594-600, 605-606).[3] Th basic facts are not, however, in dispute.

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[2] *Railway Express Agency Inc.* v. *Higgins*, Civil Action No. 35-68
Railway Express Agency, Inc. v. *Higgins*, Civil Action No. 56-171
Railway Express Agency, Inc. v. *Johnson*, Civil Action No. 75-32
Railway Express Agency, Inc. v. *Johnson*, Civil Action No. 93-26

[3] Some of the merchant agents also are employed by a railroad as a agent, caretaker, or in some other capacity. Petitioner includes the with the category of merchant agent because their express activities a neither conducted on railroad property nor engaged in during the hou that the person is working for the railroad. Thus, there is no conne

There were 1469 merchant agents in 1937, and 387 of them had some connection with a railroad. Of the entire group, 737 were merchants or storekeepers, 56 were farmers. 53 were housewives, 92 were postmasters or postmistresses, 117 were in the trucking, drayage, bus or taxi business, and 62 operated automobile agencies, service stations or garages. The remainder were engaged in a wide variety of businesses and occupations. (F. 33, P. A. 612-613.) Many of these agents have large investments in their outside businesses and only a small investment in their express business (F. 40, P. A. 614). While no finding was made by the examiner in the 1948 proceeding concerning the amount of commissions received by the merchant agents not paid a fixed amount, they usually are located in small communities providing a limited volume of business (F. 31, P. A. 612). In the 1938 proceeding, the examiner found that, in the month of March 1937, about 50% of the merchant agents earned commissions of less than $5.00 and

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tion between the person's express activities and his railroad job. The examiner apparently recognized this as to some such persons, but nevertheless included those who were also employed as a railroad agent in the category of joint agents (P. A. 595, 605, 672), and those also employed as railroad caretakers or custodians in the category of "caretaker or custodian agents," together with those railroad agents who handled their express activities on railroad property during the hours that they were employed by a railroad (P.A. 596, 605). Similarly, the examiner refused to categorize as merchant agents those persons paid a fixed sum rather than a commission even though they differed from the merchant agents in no other respect, and lumped them together with other agents that admittedly are employees in a category entitled "Fixed Allowance Agents" (P. A. 597-598). Also, the examiner has treated his limited category of merchant agents as part of a broader group which includes agents of all types who are paid on a commission basis, and which he refers to as "Commission Agents" (P. A. 594-597, 605-606). In this petition, we use the term "merchant agents" to include all those with respect to whom a refund is sought, and not in the narrow sense adopted by the examiner. While the Board's findings cited in support of the factual statements made in this petition thus technically may not refer to all the merchant agents, the evidence of record is the same with respect to all of them (other than the immaterial factors used by the examiner to draw his distinctions).

approximately 85% earned commissions of less than $50.00 (P. A. 170). The relationship is terminable at will by either party (F. 36, P. A. 613).

Merchant agents perform various express services such as the receipt and delivery of express shipments, the collection of transportation charges, making out claim papers, receipts and waybills, and keeping necessary records (F. 15, P. A. 607). The express office is located on their own property or at such place as they may obtain (F. 13, P. A. 605-606). The actual work is often performed, in whole or in part, by assistants, and the use, selection, and payment of such assistants is entirely controlled by the merchant agents (F. 41, P A. 614).[4] The express activities are usually performed during the normal hours of the agent's other business (F. 34 P. A. 613). The merchant agents, however, do not devote their full time to the express business and may absent themselves from the express offices at any time without consulting or obtaining the permission of petitioner (F. 35, P. A. 613). The necessary forms and some of the equipment may be supplied by petitioner, but at least some of the equipment used in handling the express business is furnished by the agent (F. 37, 38, P. A. 613).

The merchant agents and their assistants are not entitled to the rights and privileges that petitioner has granted to its employees, such as seniority (F. 28, P. A. 611-612), paid vacations and free transportation (F. 29, P.A. 612). They are not included among petitioner's employees in the reports made by petitioner to the Interstate Commerce Commission (F. 30, P. A. 612).

Newly-selected merchant agents are instructed by petitioner concerning the nature of the express business to be performed by them (F. 39, P.A. 614). Many, but not all, of them partially complete a standard form entitled "Application for Employment" (F. 22, P.A. 610), and they use standard forms supplied by petitioner in transferring accounts (F. 24, P.A. 610) and in accounting to petitioner for the business done by the agency (F. 25, P.A. 610-611). Many, but not all, of the merchant agents are furnished a manual of rules and regulations, but only those rules that relate to the duties of merchant agents are applicable to them (F. 18-19, P.A. 608-609). The rules in general concern such matters as the acceptance, transportation and delivery of shipments, and their protection from disappearances and injury; the regular duties of agency and messenger forces and the business involved in carrying on an agency; and the acquisition, disposal and care of supplies, property, and equipment furnished by petitioner (F. 19, P.A. 609). Petitioner also occasionally distributes to the merchant agents circulars and bulletins relating to the conduct of the express business (F. 20, P.A. 609-610).

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[4] "The merchant agent hires, discharges and determines the working conditions and rate of pay of those who may perform for him or her some of the Express Agency's work." (Appendix A, p. 27, *infra.*)

It was on the basis of these findings of fact that the examiner and the Board made an ultimate finding that the service of the merchant agents and their assistants "has been rendered subject to the continuing authority of the Express Agency to supervise and direct the manner of its rendition" (F. 42, P.A. 614), and thus concluded that they are "employees" of petitioner within the meaning of that term as defined in the Railroad Retirement and Unemployment Insurance Acts. Petitioner petitioned for review by the Court of Appeals for the Seventh Circuit, pursuant to the jurisdiction granted by 45 U.S.C. 355(f) and 45 U.S.C. 228k. The Court of Appeals affirmed the order of the Board. In addition to the facts found by the Board, the Court of Appeals noted from the record that the merchant agents furnish any business machines, telephones, and motor trucks used by them in operating the express agency; have control, at their sole expense, of advertising and insurance; determine the hours during which the agency is open for business; and occasionally receive oral instructions from petitioner's route agents during their periodic visits. (See Appendix A, p. 27, *infra.*)

Reasons for Granting the Writ

This case raises an important issue concerning the coverage of the Railroad Retirement and Unemployment Insurance Acts. The Railroad Retirement Board and the Court of Appeals have held that a large number of independent businessmen, called "merchant agents," and their employees, that have contracted with petitioner to operate express agencies in small communities as an adjunct of their regular business or occupation, are "employees" of petitioner within the coverage of the Acts. Although the Board and the Court of Appeals reached the same conclusion, they followed different routes to that conclusion and also differed with the approach to this problem taken by other courts under the same and closely related statutes.

The Railroad Retirement Act of 1937 and the Railroad Retirement Tax Act (formerly called the Carriers Taxing Act of 1937) provide a system of retirement taxes and benefits for railroad employees similar to that provided in the Social Security Act for most other employed or self-employed persons. The Railroad Unemployment Insurance Act similarly provides a federal system of unemployment insurance contributions and benefits for railroad employees. The Railroad Retirement Act, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act all contain substantially identical definitions of "employer" and "employee," and it is clear that their coverage is intended to be identical. *Railroad Board* v. *Duquesne Co.*, 326 U.S. 446, 448.

The Railroad Retirement and Unemployment Insurance Acts, so far as relevant here, define "employee" to mean "any individual in the service of one or more employers for compensation," and provide that an "individual is in the service of an employer . . . if . . . he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service."

1. *Common Law or Specialized Criteria.* The fundamental issue here is whether the Congress by its definition of "employee" in the Railroad Retirement and Unemployment Compensation Acts intended to codify and adopt the full body of the common law criteria, or instead to prescribe a precise statutory formula which was to be the exclusive litmus, by which to separate independent contractors from employees.

(a) This Court has frequently granted certiorari to resolve the issue of whether the Congress intended the common law criteria or some distinct statutory test to be applied in determining the coverage of "employees" under analogous statutes. It has done so with respect to the Federal Employers' Liability Act, *Hull* v. *Phila. & Reading Ry. Co.*, 252 U.S. 475; *Robinson* v. *Balt. & Ohio R. R.*, 237 U.S. 84, the Fair Labor Standards Act, *Walling* v. *Nashville, C. & St. L. R. Co.*, 330 U.S. 158; *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, the National Labor Relations Act, *Labor Board* v. *Atkins & Co.*, 331 U.S. 398; *Labor Board* v. *Hearst Publications*, 322 U.S. 111, and the Social Security Act, *Bartels* v. *Birmingham*, 332 U.S. 126; *Harrison* v. *Greyvan* (*United States* v. *Silk*), 331 U.S. 704.[5]

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[5] It has accepted the common law criteria for the Federal Employers Liability Act, and rejected them for the other three statutes. But see pp. 16-17, *infra*. The choice is of course governed by the intention of Congress in the particular statute. Moreover, in each of the cases under the latter three statutes the issue was coverage or exemption. As in *Reynolds* v. *Northern Pac. Ry. Co.*, 168 F.2d 934, 938 (C.A. 8), "the question here is not the usual one of whether the workers involved will be left excluded

The Court has yet to consider this issue with respect to the Railroad Retirement and Unemployment Insurance Acts. The issue obviously is as important to the administration of those Acts as it is to the administration of the other statutes as to which this Court has resolved the issue.

(b) The Board rejected the common law criteria as a measure, and went on to state that although the statutory language "does not differ substantially from the common law stated in many of the cases, it is nevertheless in substitution therefor (P. A. 627-628). The Court of Appeals, while adopting a fundamentally different analysis than the Board, stated that "If there is any real difference between the generally accepted common law tests and the statutory definition, the latter must prevail," and therefore focused its "attention on the words 'if * * * he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service'." (Appendix A, pp. 30, 31, *infra.*)

This dismissal of the common law criteria was, we believe, plainly erroneous. The definitions of "employee" trace back through the Railroad Retirement Act of 1935, 49 Stat. 968, the Railroad Retirement Act of 1934, 48 Stat. 1283, and the Railway Labor Act Amendments of 1934, 48 Stat. 1186, to the Railway Labor Act of 1926, 44 Stat. 577, where "employee" was defined to include "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) * * *"[6] The Railway Labor Act of 1926

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from some general field of social legislation, for they are admittedly within the operation of either the Social Security Act or the Railroad Retirement Act. . ." With occasional exceptions, the "merchant agents" and their employees if excluded from the railroad acts will be covered by the Social Security Act and state unemployment insurance legislation.

[6] See *Railroad Board v. Duquesne Co.*, 326 U.S. 446, 451, where the Court notes that the corresponding definition of "employer" in the Railroad Retiremeat and Unemployment Insurance Acts also traces back to the Railway Labor Act.

was concerned with the prevention and settlement of labor disputes between a railroad and its employees, and clearly was not intended to apply to the railroads' relationships with persons traditionally regarded under the usual common law concepts as independent contractors. Thus, in *Nashville, C. & St. L. Ry.* v. *Railway Employees' Dept.*, 93 F.2d 340, 342 (C.A. 6), the court noted that the parenthetical phrase in the Railway Labor Act definition of employee "codifies the common law rule of master and servant." See, also, *Teamsters Union* v. *N.Y., N.H. & H.R. Co.*, 350 U.S. 155, 159-160.

The subsequent statutes, like the Railway Labor Act, were sponsored by the brotherhoods of railroad workers, sometimes in cooperation with the railroads. There is nothing in the legislative history of those statutes indicating that the Congress intended to impose a new and distinct test for distinguishing employees from independent contractors, and it seems clear that such was not intended. The spokesman for the railroad brotherhoods on behalf of the bill subsequently enacted as the Railroad Retirement Act of 1937 stated that "subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service" is "standard language that this committee has approved heretofore in the Railway Labor Act."[7] It was explained in the hearings, committee reports, and debates on the bill enacted as the Railroad Unemployment Insurance Act that its coverage was identical with the coverage of the Railroad Retirement Act, and that separate treatment of unemployment compensation for railroad workers was justified by the precedents of the Retirement Act, the Railway Labor Act, the Federal Employers' Liability Act and similar legislation regulating various aspects of the relationship between the railroads and their workers.[8] We have already noted that the F. E. L. A., like the Railway Labor Act, has been interpreted to import the established common law principles for determining the existence of an employer-employee relationship.

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[7] Hearings on H.R. 6956 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., pp. 19-20.

Furthermore, an attempt in the 79th Congress to expand coverage of the Railroad Retirement and Unemployment Compensation Acts to include independent contractors, and their employees, performing services integrated into the operations of a railroad, did not succeed. Although supported as necessary to prevent "contracting out" from under the coverage of the acts (92 Cong. Rec. 6601, 8261), the bill was changed before passage to retain the existing coverage provisions with two minor exceptions not relevant here.[9] The opponents of extended coverage were of the view that coverage should be limited to persons "who are regularly regarded as railroad workers" (92 Cong. Rec. 7251) as in the existing statutes and in all railway legislation since the Railway Labor Act of 1926.[10] They prevailed in this view.

The action of the Court below, ignoring the common law indicia of an independent contractor status and looking only to the bare words of the statute, not only is contrary to the intent of the Congress, but also conflicts in reasoning and in result with decisions by other courts of appeals. In *Nicholas v. Denver & R. G. W. R. Co.*, 195 F. 2d 428, 430

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[8] Hearings on H.R. 10127 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., at pp. 29-30; H. Rept. No. 2668, 75th Cong., 3d Sess., p. 1; S. Rept. No. 2164, 75th Cong., 3d Sess., p. 1; 83 Cong. Rec. 9068, 9069-9070, 9072, 9075.

[9] A thorough discussion of the legislative history of the amendatory legislation may be found in *Nicholas v. Denver & R.G. W.R. Co.*, 195 F.2d 428 (C.A. 10). See, also, *Kelm v. Chicago, St. P., M. & O. Ry. Co.*, 206 F.2d 831 (C.A. 8).

[10] See the debates reported at 92 Cong. Rec. 6600-6601, 7216-7217, 7251, 8260, 8262-8263, 9983, 10153, 10319. See, also, 92 Cong. Rec. A 3430, A 4906.

(C.A. 10), the court held that an independent contractor and its employees are not "employees" of a railroad for purposes of the Railroad Retirement Tax Act, and applied "well recognized principles of general law" in holding that an operator of a stockyards for a railroad was an independent contractor. In *Pennsylvania R. Co.* v. *United States*, 108 Ct. Cl. 419, 70 F. Supp. 595, stevedores were held not to be "employees" of the railroad. The contract between the railroad and the stevedoring company provided that the employees of the stevedoring company were to be removed upon demand by the railroad, and were to "conform to the general rules and regulations of the Railroad while on duty," and that the "work of the Contractor shall be under its supervision, subject to the general direction of the Superintendent of the Railroad, or his accredited representatives." 108 Ct. Cl., at p. 423. The services rendered by the stevedores were an integral part of the railroad's service as a common carrier, and had formerly been performed by employees of the railroad. 108 Ct. Cl., at pp. 431, 432. In *Reynolds* v. *Northern Pac. Ry. Co.*, 168 F. 2d 934 (C.A. 8), the Court held that persons engaged in loading coal, cleaning cars, and performing similar services constituting an integral part of a railroad's operations were not "employees" of the railroad even though some of the contracts involved required that the work be performed "in a manner satisfactory to and in compliance with the instructions and rules of the Superintendent of the Railway Company." 168 F. 2d, at p. 940. The same result was reached in *Kelm* v. *Chicago, St. P., M. & O. Ry. Co.*, 206 F. 2d 831 (C.A. 8).

2. *Relationship With the Social Security Act.* The decision below threatens to disrupt the complementary relationship between the Railroad Retirement Act and the Social Security Act. The two statutes were intended to be mutually exclusive, so that a particular relationship

would come within the coverage of only one of the statutes. Thus, an employee of a railroad would be subject to the Railroad Retirement Act while an independent contractor with a railroad, and his employees, would be subject to the Social Security Act. *Reynolds* v. *Northern Pac. R. Co.*, 168 F. 2d 934, 938-939 (C.A. 8); *Martin* v. *Federal Security Agency*, 73 F. Supp. 482 (W.D. Pa.), aff'd, 174 F. 2d 364 (C.A. 3).

The early decisions under the Social Security Act for the most part held that general common law principles were to be applied in determining whether a person was an "employee" for purposes of the Act. See, e.g., *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51 (C.A. 6); *Williams* v. *United States*, 126 F. 2d 129 (C.A. 7); *Texas Co.* v. *Higgins*, 118 F. 2d 636 (C.A. 2). In *United States* v. *Silk*, 331 U.S. 704, and *Bartels* v. *Birmingham*, 332 U.S. 126, this Court reversed administrative attempts to extend the coverage of the Act to certain independent contractors and their employees, but indicted in dicta that a statutory test broader than the usual common law rules was to be applied in distinguishing between employees and independent contractors. When the Social Security Administrator and Treasury Department promulgated regulations abandoning the common law tests, relying on this dicta, the Congress almost immediately amended the Act to provide that "The term 'employee' . . . does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual . . . who is not an employee under such common-law rules." 62 Stat. 438. The amendment was made retroactive to the date of enactment of the Social Security Act, and the legislative history emphasizes that its purpose was to restore the original intent of the Congress that the common law rules be applied.[11]

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[11] See *Zipser* v. *Ewing*, 197 F.2d 728 (C.A. 2), and *Party Cab Co.* v. *United States*, 172 F.2d 87 (C.A. 7), where the history of the amendment is discussed.

The Congress, therefore, undoubtedly intends, as it always intended, that the common law criteria be applied in determining whether an employee or independent contractor relationship exists for purposes of the Social Security Act. In view of the complementary relationship of the Social Security Act with the Railroad Retirement Act, it seems obvious that the Congress did not intend some different criteria to be applied in distinguishing employees from independent contractors under the latter statute.[12] The application of different criteria could result in determinations by the separate agencies administering the two acts that neither or both statutes are applicable to particular persons. Indeed, in some instances at least merchant agents have paid social security taxes on the entire salaries of their employees even though such employees expended part of their time in handling the agent's express business (P.A. 234, 273, 308-309, 370), and have now been held in this case to be employees of petitioner thereby obligating petitioner for contributions under the Railroad Retirement Tax Act.

3. *The Common Law Rule.* There cannot be doubt that the merchant agents are at common law independent contractors, not employees. They are small, independent businessmen operating the express agencies for the most part in conjunction with some other business or occupation. The merchant agents have independent control of the location of the agency, its hours of operation, and the selection, duties, compensation, and discharge of any assistants employed. Their profit or loss from the operation of the agency depends in large part upon their own initiative, judgment, and energy, since they are compensated on a

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[12] One of the principal objections to the extension of coverage to certain independent contractors as proposed in the 79th Congress, see p. 14, *supra*, was that it would cause conflicts and confusion between the coverage of the Railroad Acts and the Social Security Act. See 92 Cong. Rec. 8262-8265.

commission basis, solicit and advertise for business on their own responsibility and at their own expense, and must bear most of the expense of operating the agencies. They have never been considered by petitioner, and do not consider themselves, to be employees, have not been reported to the Interstate Commerce Commission as employees of petitioner, and have not received the benefits, such as paid vacations and seniority rights, which petitioner grants to its employees.

These are all strong indicia that the merchant agents control the details of the operation of the express agency, and thus are independent contractors at common law. See, e.g., *Standard Oil Co. v. Anderson*, 212 U.S. 215; *Casement v. Brown*, 148 U.S. 615, 622; *Del Vecchio v. Pennsylvania Railroad Company*, 233 F.2d 2 (C.A. 3); *Williams v. United States*, 126 F.2d 129, 132 (C.A. 7). The merchant agent is "an independent employer of labor, conscious of his own power to direct and willing to assume the responsibility of direction and to be judged by its results." *Chi., Rock Isld. & Pac. Ry. v. Bond*, 240 U.S. 449, 456-457. Nor is this conclusion affected by the facts that the merchant agents (but not their employees) are instructed in the nature of their duties when the relationship is first established; that some of them are given a manual of rules and regulations relating in part to the duties of merchant agents and occasionally supplemented by circulars;[13] that petitioner's route agents visit the merchant agents perhaps two or three times a year to check their accounts and observe whether the agency is being operated satisfactorily;[14] that petitioner furnishes the merchant agents with the standard forms used in its paperwork and occasionally with some equipment; and that the relationship is terminable by either party at will.

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[13] The rules and regulations have so little relevance to the operations of the merchant agencies that petitioner leaves the distribution of the rules and regulations to the merchant agents to the discretion of its division superintendents. While most division superintendents have made the rules and regulations available to the merchant agents, others have not, one testifying that he "felt [a merchant agent] had little need for them." (P.A. 496.)

Certainly, the merchant agents have as much independence and control over the details of their work as the insurance agents in *Zipser* v. *Ewing*, 197 F.2d 728, 731 (C.A. 2), who were furnished "a manual of rules and regulations for [their] guidance in selling and servicing policies," were required to maintain records and fill out certain forms (supplied by the insurance company) in strict conformity with the rules and regulations, and were subject to termination of the relationship at any time on notice; or as the taxi drivers in *Party Cab Co.* v. *United States*, 172 F.2d 87 (C.A. 7), who were required to obey the rules and regulations of the taxicab company subject to the right of the company to terminate the relationship; or as the commission agents in *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51, 53-54 (C.A. 6), who operated bulk gasoline distributing plants on premises furnished by the company, sold gasoline supplied by the company at prices fixed by the company, were furnished by the company with a rule book that "detailed safety measures, provisions for the care of the Company's funds, repair and maintenance of its property, and methods for successful operation of the business, were sent "from time to time, certain circular letters, dealing with the proper operation of the business, were asked to attend sales conferences held on various occasions, and were visited twice a year by a company auditor who inspected their "operations and methods of doing business."

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[14] The Board made no findings of fact concerning supervision by the route agents. There is evidence in the record that the route agents visit the merchant agents perhaps two or three times a year to check their accounts and to see that they are operating their agency satisfactorily (P.A. 24-25, 38, 137, 235-236, 267-269, 301, 306, 317, 326, 365-366, 494, 517; R.A. 31). Also, the route agents sometimes inform the merchant agents whether or not a particular rule or regulation is applicable to them (P.A. 137, 267-269, 360, 497). *The permission of the merchant agents is required before the route agents can inspect the agency premises and records* (P.A. 278-279, 483-484, 522).

The truckers in *Harrison v. Greyvan* (*United States v. Silk*), 331 U.S. 703, were given a course of instructions in the company's methods of doing business, directed by company dispatchers concerning where and when to pick up or deliver freight, supplied with insurance by the company, and given a manual of instructions regulating in detail the manner in which the truckers performed their duties (which the company testified it did not attempt to enforce). The company also had some trucks that admittedly were driven by its employees, and the "Operations by the company under the two systems were carried out in the same manner." 331 U.S., at p. 710. Even though this Court, prior to the amendment of the Social Security Act, rejected the common law criteria and looked to the economic realities of the relationship in the light of the broad social purposes of the statute, it held that the truckers were independent contractors and not employees of the company since, just as the merchant agents here, "the truckmen hire their own assistants, own their trucks, pay their own expenses, with minor exceptions, and depend upon their own initiative, judgment and energy for a large part of their success." 331 U.S., at p. 716. The Court pointed out that, as is equally true under the Railroad Acts, "There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution." 331 U.S., at p. 714.

4. *The Case Should in Any Event Have Been Remanded for Reconsideration.* Even if the legal standard applied by the court below were correct, it erred in sustaining, as sup-

ported by substantial evidence, the Board's conclusion based upon a different legal theory.

The inordinate length of the 222 pages of the Examiner's Report (P.A. 582-804), adopted by the Board (P.A. 839-840), precludes an inescapably demonstrable basis for its decision. But it is plain enough that its fundamental rationale consists of a minute analysis of each element of the relationship between petitioner and the merchant agents and their employees, considered separately and apart from all the other elements of the relationship. Because each such element, considered alone, also was an element in petitioner's relationship with some other group of its agents "conceded" to be employees of petitioner or in some cases where an employer-employee relationship had been found to exist, the Board concluded that the existence of the particular element failed to indicate that the merchant agents are independent contractors.[15] (P.A. 645-804; see, particularly, P.A. 697-792). Thus, for a single example, the Board refers to the fact that the merchants agents are free to select the location of the agency office, and stated that " . . . since the freedom of action accorded the merchant agent in this respect is no greater than that accorded the exclusive commission agent, an admitted employee, it is clear that this is not a factor which would tend to indicate that the merchant agents are not employees of the Express Agency." (P.A. 703.)

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[15] The Board relied most frequently in this regard on a comparison of the merchant agents with the joint agents, said to have been "conceded" by petitioner to be employees. In so doing, the Board ignored the fact that petitioner's "concession" with regard to the joint agents was made for purposes of this case alone and then only in furtherance of an offer in compromise, and that in no sense did petitioner concede that the joint agents in fact are its employees (P.A. 230). Furthermore, while petitioner's relationship with the merchant agents is in many ways similar to its relationship with the joint agents, there are a number of significant differences, which the Board wrongly ignored by pursuing its independent examination of each separate element of the relationship.

The Court of Appeals rejected the Board's atomization of the relationship between petitioner and the merchant agents, properly holding that "whether merchant agents are employees or independent contractors must be determined on the basis of the entire situation," and that "The quality of the relationship (employee or independent contractor) is to be judged by the presence or absence of no single evidentiary factor." (Appendix A, at p. 31, *infra.*) See *United States* v. *Silk*, 331 U.S. 704, 719. Despite this rejection of the Board's piecemeal approach, the Court of Appeals affirmed on the ground that the Board's procedure was not arbitrary or capricious and that substantial evidence in the record supports the Board's ultimate finding that the merchant agents and their employees are employees of petitioner.[16]

Findings of an administrative agency, when supported by substantial evidence in the record as a whole, are of course conclusive if they have a reasonable basis in law. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474; *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143. It is equally well established, however, that the "Administrative determinations must have a basis in law and must be within the granted authority." *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 677-678. More particularly, they must also be supportable on the basis assigned by the agency, *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 92-93; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U.S. 944, 945.

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[16] Among the evidence said to support the Board's determination wa the receipt by the merchant agents of "oral instructions from Expres Agency's Route agents whose function is to visit the non-exclusive commission agents periodically to see that Express Agency's Rules and Regulations are observed." (Appendix A, p. 26, *infra.*) The Board made n finding to this effect. (See footnote 14, p. 19, *supra.*)

The Court of Appeals rejected the piecemeal approach of the Board and held as a matter of law that the relationship must be considered as a whole. Under the doctrine of the *Chenery* case, this should have resulted in a remand to the Board for reconsideration pursuant to the principles laid down by the Court of Appeals.

Conclusion

For the reasons given above, this petition for a writ of certiorari should be granted.

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APPENDIX A

Before DUFFY, *Chief Judge, and* FINNEGAN and HASTINGS, *Circuit Judges.*

DUFFY, *Chief Judge.* Railway Express Agency seeks a review of jurisdictional order No. 56-235 of the Railroad Retirement Board dated August 29, 1956, holding that 1) certain classes of individuals rendering service for Express Agency come within the definition of "employee" under the Railroad Retirement Act (45 U.S.C. §§228 (a-y)), and the Railroad Unemployment Insurance Act (45 U.S.C. §§351-367) and 2) denying Express Agency's claim for a refund of contributions paid under protest in the sum of $108,816.89 pursuant to Title 45 U.S.C. §358 Railroad Unemployment Insurance Act.

Express Agency did not consider those of its agents defined as "merchant agents" and as "joint agents" and their assistants as employees under the Railroad Retirement Act. By reason thereof, the proceedings now before us were initiated by Board order dated October 28, 1937. The Railroad Unemployment Insurance Act became effective on July 1, 1939. By order dated August 1, 1939, the Board held that individuals who were designated "joint agents" and "merchant agents" were employees under the Railroad Retirement Act.[1] The Board designated the proceedings "Jurisdictional Docket No. 2."

Thereafter, Express Agency paid, under protest, railroad retirement taxes and railroad unemployment insurance contributions with respect to "merchant agents", "joint agents" and their employees. On June 23, 1948, the Board reopened Jurisdictional Docket No. 2 and initiated proceedings which it designated as Jurisdictional Docket No. 2-2A which resulted in Board order 56-235 dated August 29, 1956, which is the basis for this petition for review.

---

[1] The Board pays benefits and collects contributions under the Railroad Unemployment Insurance Act. These functions are divided under the Railroad Retirement Act; the Board pays benefits under that Act and the Internal Revenue Service administers a companion taxing statute. Only unemployment insurance contributions are involved in this proceeding against the Board.

The rail express operations of Express Agency are conducted by virtue of a standard agreement between Express Agency and each railroad over which express shipments are carried. Arrangements were made in this agreement for railroad agents and other employees to act as express agents on railroad premises. These agents are referred to as "joint agents" or "joint railroad-express agents."

Express Agency also arranged with merchants and others having occupations wholly outside the railroad industry whereby such persons would represent the Express Agency as agents and conduct the express business on premises which they occupied. These agents have been classified as, and are referred to herein as "merchant agents." Joint agents and merchant agents are used principally in smaller communities where the volume of business would not support a full-time agent.

At the opening of the first hearing in Jurisdictional Docket No. 2-2A held August 10-12, 1948, Express Agency stipulated solely for the purpose of these proceedings that "joint railroad express agents" and their employees are employees of the Express Agency under the two Acts. At the time of the hearings, Express Agency had approximately 22,000 agents. Of these more than 16,000 were "joint railroad-express agents."

In the 1938 proceedings, Express Agency identified 1460 individuals as "merchant agents." Of these 734 were merchants or storekeepers, 56 were farmers, 53 were housewives, 92 were postmasters or postmistresses, 117 were in the trucking, drayage or taxi business, 62 operated automobile agencies, service stations and garages. The remainder were engaged in occupations such as clerk, packing concern employee, coal company employee, store employee, hotel employee, teacher, priest, student, insurance salesman, mail carrier, undertaker, painter and blacksmith. These agents were generally paid on a commission basis which was often in a small amount.

There were no formal written agreements between Express Agency and its agents except such as might be included in its Form 100 "Application for Employment" and its Form 95 "Special Instructions to Agents." Form 100 is and was completed by all commission agents, exclusive and non-exclusive, and also by salaried agents and all other regular employees. Prior to November, 1945, this form included an agreement by the signer to "faithfully perform all his duties, including the keeping of true and correct accounts of the business of the Company conducted by him or in his charge, all as required by the rules and regulations of the Company; * * *"

All commission agents, exclusive, joint, and merchant included, used Form 95 "Special Instructions to Agents" for the transfer of accounts from one agent to another, and the same form of monthly balance sheets.

At the time an agreement is made for the representation of Express Agency by a merchant agent, a supervisory employee of the Express Agency instructs the new agent as to the practices to be followed in the conduct of the Express Agency. Non-exclusive commission agents, merchant agents included, are customarily furnished with a copy of Express Agency's "General Rules and Instructions." Two editions of this book were issued, one in 1936 and the other in 1948. It is the 1936 edition which was usually referred to throughout the hearings. The Rules were preceded by the following: "Notice to Employees: The Rules, Instructions and Information contained herein are intended for the guidance and use of the Company's employees only. The business of the Company must be transacted strictly in accordance therewith."

The "Rules" contained 1155 rules and instructions, setting forth in great detail how the many operations of the express business, including those of non-exclusive agents, are to be conducted. The General Rules and Instructions were issued for the guidance of all individuals doing express work whether salaried employees or exclusive or non-exclusive commission agents.

Various circulars and bulletins were sent out by Express Agency's superintendents to non-exclusive commission agents, including merchant agents. Such agents also received oral instructions from Express Agency's Route agents whose function is to visit the non-exclusive commission agents periodically to see that Express Agency's Rules and Regulations are observed.

Express Agency furnishes to agents, including merchant agents, necessary forms and stationery to conduct express business. Other equipment furnished varies from agency to agency, but may include platform scales, counter scales, safe, platform trucks, desks, chairs, stationery cases, chests of drawers, metal stamps and revolver. Where Express Agency furnishes scales and trucks, it maintains and replaces them at its own expense. Except with respect to the handling of express shipments to and from trains and in performing pickup and delivery work, the merchant agents usually perform their express work on their own premises.

The merchant agent furnishes 1) the place where the express business is to be performed; 2) business machines such as typewriters and adding machines; 3) the telephone; 4) the motor truck if pickup and delivery service is furnished, together with gasoline, oil, repairs; 5) advertising of express in the merchant agent's location; 6) all insurance which may be carried including workmen's compensation and public liability and fire insurance. The merchant agent hires, discharges and determines the working conditions and rate of pay of those who may perform for him or her some of the Express Agency's work.

Some merchant agents have substantial investments in their business interests in addition to their express work, but most of such agents have a comparatively small investment in the express service as such. Both Express Agency and the merchant agents may terminate the relationship at any time.

At all merchant agencies, express shipments are received and delivered, and Express Agency's uniform receipts are used; transportation and C.O.D. charges are collected; regular reports to Express Agency are made on Agency forms, and funds are remitted to the Agency regularly. At some merchant agencies financial paper is sold, trains are met when necessary and pickup and delivery of shipments by motor truck are furnished.

No commission agents are carried on the Express Agency's payroll. They receive their compensation by deducting the amount of their commissions from the express charges collected by them. This commission generally amounts to 10% of the express charge. At times, however, there is an additional charge for services such as pickup and delivery.

Express Agency does not specify or set the working hours of the non-exclusive commission agents, such as merchant agents. Such business is usually performed during the customary business hours of the agent's regular business or occupation. However, shipment of perishable products and animals may have to be handled outside of normal business hours and train schedules may also require service beyond the hours during which merchant agents ordinarily carry on their own business.

Express Agency conducts operations by rail, water, motor vehicle and air. It is a common carrier and is subject to Part I of the Interstate Commerce Act, and, as such, is an "employer" under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. Express Agency was organized by certain railroads in the continental United States and began operations March 1, 1929. It is successor to the American Railway Express Company which had conducted express transportation business since July 1, 1918, when it succeeded the Adams Express Company, the American Express Company, the Southern Express Company and Wells Fargo & Company which were the principal express companies operating in the United States at that time.

Railway Agency urges that its merchant agents are not employees but are independent contractors. It points to various tests under common law principles and insists that these tests establish the status of independent contractor for its merchant agents. Among other items are that the merchant agent furnishes the premises where the express business is conducted; he hires and discharges the individuals who work for him in the express business; he furnishes business machines and he is not granted a vacation by the Express Agency. The question of control over details of the work is also stressed.

The examiner made detailed Findings of Fact and Conclusions of Law which were adopted by the Board which then determined that certain agents including merchant agents and the individuals engaged by them to perform and assist in performing express work "are and have been at all times employees of the Express Agency with respect to their express work, within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts, except that no opinion is expressed with respect to the creditability of any pickup and delivery service performed at any express office as a part of a general drayage business conducted by the agent or his assistant."

Section 5(f) of the Railroad Unemployment Insurance Act, which is incorporated by reference in Section 11 of the Railroad Retirement Act states: "* * * The findings of the (Railroad Retirement) Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. * * *" Therefore, the Retirement Board's decision should not be set aside if supported by substantial evidence, is not arbitrary and has a reasonable basis in law. *Monahan* v. *Railroad Retirement Board*, 7 Cir., 181 F. 2d 751, 753; *Dunne* v. *Railroad Retirement Board*, 7 Cir., 183 F. 2d 366, 367; *Schafer* v. *Railroad Retirement Board*, 7 Cir., 217 F. 2d 874, 875. To sustain the Commission's interpretation and application of the statutory term "employee" we need not find that such construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. *Southern Development Company* v. *Railroad Retirement Board*, 8 Cir., 243 F. 2d 351, 353, (citing and quoting from *Unemployment Compensation Commission etc.* v. *Aragan*, 329 U.S. 143, 153). "It is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130.

There was nothing arbitrary or capricious about the Board's procedure. Three hearings were held. Express Agency was given unlimited opportunity to produce witnesses and to introduce exhibits. Agency's attorneys were permitted to make oral arguments before the examiner at the first hearing, before the Board at the second hearing, and before both the examiner and the Board in the third hearing.

One difficulty in determining by the application of common law principles whether an individual is an employee or an independent contractor is that there is no single, universally accepted formula for the common law tests. In *Williams* v. *United States*, 126 F. 2d 129, 132 this Court pointed out that there is a "considerable contrariety of opinion" as to the elements in the common law test.

If there is any real difference between the generally accepted common law tests and the statutory definition, the latter must prevail. Insofar as this litigation is concerned, the definition of the term "employee" is the same in the Railroad Retirement Act,[2] the Railroad Unemploymen Insurance Act,[3] and the Railroad Retirement Tax Act.[4] The Railroad Retirement Act, under Section 1(b) and (c) provides:

> "(b) The term 'employee' means (1) any individual in the service of one or more employers for compensation * * *
>
> "(c) An individual is in the service of an employer * * * if (i) he is subject to the continuin authority of the employer to supervise and direct th manner of rendition of his service, or he is renderin professional or technical services and is integrated int the staff of the employer, or he is rendering, on th property used in the employer's operations, othe personal services the rendition of which is integrate into the employer's operations, * * *"

As the merchant agents do not render professional o technical services, we can eliminate a consideration of th phrase "or he is rendering professional or technical serv ices and is integrated into the staff of the employer." Furthermore, the last clause hereinbefore quoted com mencing with the words "* * * or he is rendering, on th property * * *" became effective only with respect to services rendered after December 31, 1946. *Reynolds* v. *Northern Pacific Railway Company*, 8 Cir., 168 F. 2d 934. We, therefore, focus our attention on the words "if * * * he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, * * *"

---

[2] 45 U.S.C. 228a(b)(c).

[3] 45 U.S.C. 351(d)(e).

[4] 26 U.S.C. 3231(b)(d).

It must be conceded that the activities of the merchant agents do present some indicia of the independent contractor status. But whether merchant agents are employees or independent contractors must be determined on the basis of the entire situation. "The quality of the relationship (employee or independent contractor) is to be judged by the presence or absence of no single evidentiary factor, but by an over-all view." *Anglim* v. *Empire Star Mines Company, Ltd.*, 9 Cir., 129 F. 2d 914, 917.

The Board found there was stronger evidence of employee status when all the activities of the merchant agents were considered. The general rules and instructions, the circular letters of instruction, the supervising activities of the Route Agents, among others, are all evidentiary items showing the existence of the Express Agency's continuing authority to supervise and direct the manner of rendition of its service.

All non-exclusive commission agents including merchant agents, perform a continuing express service. Their work is an integral part of Express Agency's regular daily nationwide transportation service. While their share of the total business is small, Express Agency could not maintain a comprehensive nationwide express service without them. The nature of Express Agency's business makes essential a supervising control over each agent's work.

We hold that there is substantial evidence to support the Board's findings that merchant agents hereinbefore described are employees of Railway Express Agency, Inc.

The decision of the Railroad Retirement Board is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Thursday, January 9, 1958

Before Hon. F. Ryan Duffy, *Chief Judge*, Hon. Philip J. Finnegan, *Circuit Judge*, Hon. John S. Hastings, *Circuit Judge*.

No. 11924

Railway Express Agency, Inc., petitioner,

vs.

Railroad Retirement Board, respondent.

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, the Order of Railroad Telegraphers, Railway Labor Executives' Association, intervenors.

Petition for Review of an order of the Railroad Retirement Board

This cause came on to be heard on the petition for review of an order of the Railroad Retirement Board, and the transcript of the record from the Railroad Retirement Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that Order No. 56-235 entered by the Railroad Retirement Board on August 29, 1956, in this cause, be, and the same is hereby, Affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 908

RAILWAY EXPRESS AGENCY, INC.
Petitioner,

v.

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS, AND RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Repondents.

BRIEF FOR PETITIONER IN REPLY

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Repondents.

BRIEF FOR PETITIONER IN REPLY

The reasons for granting the petition for certiorari are emphasized by certain aspects of the Board's brief in opposition, which has been adopted by the respondent unions.

(1) The Board does not attempt to deny the assertion in the petition that the decision below "conflicts in reasoning and in result" with the decisions of other courts of appeals, in the *Nicholas* and *Reynolds* cases, and with the decision of the Court of Claims in the *Pennsylvania R. Co.* case (Pet, at pp. 14-15), other than by stating that in those cases "the alleged 'employees' were themselves in-

dependently engaged to some extent in the same field of business as the alleged employer." (Br., at p. 21.) If the Board means to imply that the persons concerned in those cases performed the same type of work for others that they performed for the alleged "employer," this was true only to a very minor extent in the *Nicholas* and *Pennsylvania R. Co.* cases and true in the *Reynolds* case only in that the services were performed for more than one railroad. None of the cases made any point of this work for others, just as the court below did not rely on the fact that the merchant agents perform express services only in furtherance of their contracts with Railway Express. Furthermore, even if this alleged distinction had any importance, it does not affect the conflict concerning whether the common-law tests or a unique statutory test are applicable.

(2) Despite the devotion of 19 pages in its opinion (P.A. 626-644) in an effort to establish that "employee status determinations under [the Railroad Retirement and Unemployment Insurance] Acts depend not upon the application of common law principles, but upon the definite statutory tests set forth in the Act," *—a view which it persuaded the Court of Appeals to adopt—the Board now admits that the pertinent statutory definition "merely restates a principal element of the common-law rule . . ., which has, in fact, been called a 'control test'." (Br., at p. 24.) Moreover, the Board in its brief has not in any way controverted our discussion, at pp. 12-14 of the petition, of the legislative history of the Acts as showing that the Congress did not intend the Acts to cover persons traditionally regarded under the usual common law concepts as independent contractors.

It may be, as the Board contends in footnote 13 of its brief (p. 25), that the "decision below does not imply that the result would have been different had a common-law test been utilized." But, neither does the decision below imply that the result would not have been different if the Board and the Court of Appeals had applied the common-law "control" test which the Board now seems to concede to be properly applicable. Other decisions of the Court of Appeals for the Seventh Circuit almost conclusively establish that its decision would have been different if it had applied the common law "control" test.

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* P. A. 626-627.

Applying that test in *Williams* v. *United States*, 126 F. 2d 129, 132 (C.A. 7), the Court of Appeals stated that:

> "A number of elements have been enumerated as bearing upon the right to control, such as the right to hire and discharge persons doing the work . . ., the method and determination of the amount of payment of the workmen . . ., whether or not the person doing the business is engaged in an independent business or enterprise and, particularly, whether he stands to make a profit on the work of those working under him . . ., which party furnishes the tools or materials with which the work is done . . ., and who has control of the premises where the work is done."

We have shown in the petition that the merchant agents have the right to hire and fire the persons doing the work of the express agency for them, determine the compensation of such persons, stand to make a profit off the work of such persons, engage in independent businesses in many instances, and have control of the premises where the work is done. Equipment is furnished in part by the merchant agents and in part by petitioner.

Moreover, it is the view of the Seventh Circuit that the absence of the power to hire and fire the persons doing the work is virtually conclusive proof of the absence of the "control" necessary for an employer-employee relationship. In holding that an orchestra leader is an independent contractor rather than an employee of the establishment where the orchestra performs, the Court of Appeals stated in the *Williams* case, at p. 133, that:

> "We have already concluded . . . that the establishments had no right to hire or discharge members of the orchestra. To our mind, this circumstance alone comes near being decisive. It is difficult to conceive of an employer-employee relationship without such a right on the part of the employer. It is equally inconceivable that such right should rest solely in the hands of the employee. Without this right there could be no effective control by an employer. As was said in *Pioneer Construction Co.* v. *Hansen,* 176 Ill. 100, 108, 52 N.E. 17, 19 '* * * and, inasmuch as the right to control involves the power to discharge, the relation of master and servant will not exist unless the power to discharge exists. * * *' "

We have already noted in the petition (p. 19) that in *Party Cab Co.* v. *United States,* 172 F. 2d 87, the Court of Appeals for the Seventh Circuit, applying the common-law "control" test, held that taxi drivers were not employees of a taxi-cab company under circumstances very similar to those of the instant case. In any event, it seems clear that petitioner is entitled to a decision on the nature of its relationship with its merchant agents made on the basis of a proper understanding of the law, whatever may be the ultimate result. *Securities Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 92-93.

(3) The Board relies heavily on the doctrine that deference is due to administrative determinations having a reasonable basis in law and supported by substantial evidence in the record as a whole. That doctrine, however, is inapplicable where, as here, the agency has not "com

plied with the statutory standards in its determination." *S.E.C.* v. *Central-Illinois Corp.*, 338 U. S. 96, 127-128. See, also, the cases cited at page 22 of the petition.

(4) While we believe that the Board's findings of fact inadequately reflect the record in a manner unfavorable to petitioner in many respects, those findings (other than the ultimate finding in terms of the statute) are accepted in the petition in recognition of the disinclination of this Court to undertake a reassessment of the evidence. The Board's brief in opposition, however, virtually ignores its own findings and ranges far and wide through the record to make statements of fact some of which were not subject to findings and, in our opinion, do not fully and fairly reflect the record.

This Court will not reassess the evidence on behalf of a Government agency any more than it would for petitioner. *F.T.C.* v. *Standard Oil Co.*, 355 U. S. 396, 401. The Board's ultimate finding must be supported by its basic findings of fact, *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 533, and if the basic findings are inadequate, as seems clearly to be the case here, the Court will not search the record to determine if the necessary additional findings could be made, *Phelps Dodge Co.* v. *Labor Board*, 313 U. S. 177, 195-196. Under these circumstances, we see no purpose in an elaborate discussion of the evidence of record. We shall, however, mention briefly a few of the more important aspects in which the Board's statement of facts in its brief does not reflect its findings or the record.

The Board did not find that petitioner is required to "closely supervise all its agencies" (Br., p. 10), or that petitioner maintains such supervision over the merchant agents. The only basic findings conceivably relating to supervision are numbers 23 through 27 (P.A. 610-611) which merely recount the fact that the merchant agents account to petitioner in certain respects and remit the funds collected by them. While the record indicates that petitioner's route agents occasionally visited the merchant agents, the Board made no findings in this regard. With respect to the extent of these visits, see footnote 14 at page 19 of the petition. The Board's findings (Nos. 18-19, P.A. 608-609), unlike its statement of facts (Br., pp. 10-11), recognize that all merchant agents have not received copies of petitioner's "General Rules and Instructions," and that some of the rules expressly do not apply to merchant agents or else do not relate to the duties of merchant agents, as well as not being applicable to agencies whose business does not include specific operations. The Board did not find that "knowledge of the various rules and instruction is essential to the transaction of express business by all agents, including merchant agents." (Br., p. 11.) The record contains evidence that the General Rules and Instructions are sufficiently unimportant with respect to operation of the merchant agencies for petitioner to leave to the discretion of its division superintendents the decision of whether to furnish the merchant agents with a copy, and some division superintendents have not done so (P.A. 496).

(5) The Board relies on *Western Union Tel. Co.* v. *McComb*, 165 F. 2d 65 (C.A. 2), a case arising under the Fair Labor Standards Act with respect to agents of Western Union. Unlike the Railroad Retirement and Unemployment Insurance Acts, the coverage of the Fair Labor Standards Act is not limited to "common law employee categories." *Walling* v. *Portland Terminal Co.*, 330 U. S. 148, 150. We may note, however, that *Blankenship* v. *Western Union Tel. Co.*, 161 F. 2d 168 (C. A. 4), held that the Western Union agents there involved were not em-

ployees of Western Union for purposes of the Fair Labor Standards Act. The facts of the realationship as disclosed in the *Blankenship* case were much closer to the facts in this case than were those of the *McComb* case, where Western Union "exercised full control over the manner in which" the business was conducted (165 F. 2d, at p. 69).

(6) The Board states in footnote 11 at page 23 of its brief that petitioner "incorrectly" asserted that the common-law tests are applied in determining the coverage of the Federal Employers Liability Act. We believe the Court will find that it is the Board that is in error. The cases cited by the Board are concerned with the issue of liability rather than coverage. The coverage cases were expressly distinguished by the Court in footnote 5 to its opinion in *Sinkler* v. *Missouri Pacific R. Co.*, No. 133, this Term, decided April 28, 1958 (26 Law Week 4253, 4255), on the ground that: "The issue in each of those cases was whether the plaintiff was an employee of the defendant railroad."

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In the Supreme Court of the United States

OCTOBER TERM, 1957

RAILWAY EXPRESS AGENCY, INC., PETITIONER

v.

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS, AND RAILWAY LABOR EXECUTIVES ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT RAILROAD RETIREMENT BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 908

RAILWAY EXPRESS AGENCY, INC., PETITIONER

v.

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS, AND RAILWAY LABOR EXECUTIVES ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT RAILROAD RETIREMENT BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 24-31) is reported at 250 F. 2d 832. The examiner's findings of fact, conclusions of law, and reasons therefor (P. A. 582-804),[1] adopted by the Railroad Retirement Board (P. A. 839-840), are unreported.

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[1] Following the petitioner's usage, we will cite petitioner's appendix in the court below as "P. A." and the respondent Board's appendix in that court as "R. A.". The petition for a writ of certiorari is cited "Pet.", its appendix "Pet. App.".

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1958 (Pet. App. 32). The petition for a writ of certiorari was filed April 9, 1958. This Court's jurisdiction is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, as the court below held, the administrative record in this case contains substantial evidence supporting a determination by the Railroad Retirement Board that certain persons concededly performing railway express work for petitioner were in fact its "employees" (rather than "independent contractors") and hence were entitled to the benefits of the Railroad Retirement and Railroad Unemployment Insurance Acts.

STATUTES INVOLVED

The pertinent provisions of the Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U. S. C. 228a–228y, the Railroad Retirement Tax Act (formerly the Carriers Taxing Act of 1937), 50 Stat. 437, as amended, 26 U. S. C. (Supp. V) 3201–3233, the Railroad Unemployment Insurance Act, 52 Stat. 1094, as amended, 45 U. S. C. 351–367, and the Social Security Act, 49 Stat. 620, as amended, 42 U. S. C. 301, *et seq.*, are set forth in the appendix to this brief, *infra*, pp. 28–34.

STATEMENT

Since March 1929, petitioner Railway Express Agency has operated a nationwide express business (P. A. 10–11). In large part, this business is conducted over the railroads of the United States, and petitioner has been designated by the railroads as the exclusive agent for the conduct of express business over their lines (P. A. 592–603; R. A. 17, 83). Petitioner is admittedly (Pet. 4) an "employer" for the purpose of the Railroad Retirement Act of 1937, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act. These proceedings were undertaken by the Board to determine whether certain classes of individuals who act as petitioner's agents are "employees" under those Acts.

A. THE CLASSES OF AGENTS

In order to render its services, petitioner maintains 22,000 agencies throughout the country and in Canada, Cuba, Alaska, and Hawaii (R. A. 90). At each agency, the company is represented by an agent in charge of the express office, who transacts the business which petitioner does in the community or area (R. A. 13, 32, 90, 98, 123–125, 128). Less than 10 percent of these agents are salaried (P. A. 47, 379–380; R. A. 3). The Board has divided petitioner's other agents, who serve on a commission basis, into the following five groups (P. A. 605–606):

1. *Exclusive commission agents* are individuals who generally devote their entire working time to express service and who perform their express work on premises under control of a railroad or of petitioner (P. A. 605, 22, 379, 399, 487–488, 504).

2. *Joint agents* are railroad agents (usually station agents) who also serve petitioner as express agents, and who usually, but not always, perform their express work on railroad premises; some joint agents

also have other business interests, such as an insurance, real estate, or feed business (P. A. 605, 36, 126–127, 135, 139, 560–561; R. A. 4, 87–88, 90).

3. *Caretaker or custodian agents* are railroad station caretakers or custodians who also serve petitioner as express agents, and who may or may not have their agency office located on railroad premises; caretaker or custodian agents may also have some other business, such as a grocery store (P. A. 605, 445, 461–462, 506, 512, 552–553, 566–568; R. A. 99–100, 104, 120).

4. *Merchant agents* are individuals serving as express agents, having their agency office located on premises not under the control of petitioner or of a railroad; they generally are engaged in some business or occupation outside the railroad or express business but some are housewives, students, etc., and engage in no business other than that of express agent (P. A. 605–606, 378, 389; R. A. 84–85). Some may incidentally be in railroad service but not as station agents or caretakers or custodians (P. A. 101–106, 429–431; R. A. 38, 144).

5. *Other commission agents* are individuals who are engaged in railroad service other than as station agent or caretaker or custodian, and who perform their express work on premises under the control of petitioner or a railroad; individuals who perform no railroad work, but who operate their express agency on railroad premises under an agreement between petitioner and the railroad; and individuals who conduct their express agency, and perhaps also engage in other business activities, on premises for

which petitioner pays rent to a third party (P. A. 606).[2]

Petitioner concedes that its salaried personnel and those designated "exclusive commission agents" and "other commission agents" are its employees for the purpose of the Railroad Retirement Act and Railroad Unemployment Insurance Act (P. A. 22, 230, 597; R. A. 3). It also concedes that "joint agents" and "caretaker or custodian agents" as a class are its employees (although this concession is stated to be solely for the purpose of this proceeding) (P. A. 230). However, petitioner claims that "merchant agents" (the fourth class above, plus a small number of others[3]) are not its employees (R. A. 90). The application of the Acts to this group alone is involved in these review proceedings.

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[2] The record also contains reference to two other types of agents. "Limited [branch] agents" are actually subagents, within the area of a regular agent. They do not transact general express business but only receive and hold shipments, accept telephone calls, influence students and others to use express service (P. A. 607; R. A. 92, 98, 123). The limited (branch) agents were held by the Board not to be "employees" (P. A. 840, 847–848; *infra*, p. 13) and their status was not involved in the proceeding in the court below or upon the instant petition.

"Fixed allowance agents" receive a fixed monthly amount for representing petitioner and otherwise are the same as other commission agents (P. A. 37, 205–206, 607; R. A. 120). Petitioner considers the allowances as commissions (P. A. 425–426, 818) and the agents may here be treated as included among other comparable commission agents, as petitioner suggests (Pet. 7, n. 3).

[3] Petitioner characterizes as merchant agents all those so designated by the Board and also those joint, caretaker, or custodian agents whose activities for petitioner's express business are not conducted on railroad property nor during their rail-

B. PETITIONER'S MERCHANT AGENTS

In the three hearings on this problem (*infra*, pp. 12–14), the Board has exhaustively examined the relations between petitioner, its merchant agents, and other agents.

In the 1937 and 1938 hearings, petitioner disclosed that, of 20,159 offices in the United States, it had salaried agents at 1,674, joint agencies at 16,769, and merchant agents at 1,469 (P. A. 19, 47, 101–106, 612; R. A. 3, 38–39, 85). Thus, the great majority of agencies are those where the agent is not in petitioner's exclusive employ (P. A. 434; R. A. 14). The type of agent who renders petitioner's service in a particular community will depend upon such factors as the size of the town, the volume of express business, the location of the railroad terminal, and the persons available, *e. g.*, the willingness of a station agent to represent petitioner (P. A. 27, 31, 33, 42, 108, 111, 113, 467–468, 685–686; R. A. 4–7, 9–10, 12–13, 84, 93–94). Nonexclusive agents are used chiefly in the smaller communities where the volume of business would not support a full-time operation but where nevertheless service must be offered as part of petitioner's nationwide business (R. A. 4, 12, 84). While generally it is most convenient to utilize a "joint agent": *i. e.*, a railroad station agent who

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road working hours (Pet. 6, n. 3; P. A. 552–553; R. A. 144). This is the essential difference between petitioner's classification and the Board's classification.

During the administrative hearings, it was agreed by petitioner that its classification of agents was not binding upon the Board (R. A. 134–135).

transacts express business at the station, this is not always possible or desirable (P. A. 27, 36; R. A. 14, 84). In such cases, petitioner utilizes merchant agents (P. A. 32; R. A. 84, 85).

Of the 1,469 merchant agents described in the earlier hearings, 734 were merchants or storekeepers, 56 were farmers, 53 were housewives, 92 were postmasters and postmistresses, 129 were in the trucking, drayage, or taxi business, 62 operated automobile agencies or service stations, and the remainder were engaged in such occupations as clerk, undertaker, priest, student, insurance salesman, and blacksmith (P. A. 103–105; R. A. 85). As indicated, these agencies usually handle small volumes of express work; at the earlier hearings, it appeared that, in a sample month, more than half the merchant agents had earned less than $10 commissions; about 80 percent had earned less than $50; and 95 percent had earned less than $150 (R. A. 39). On the other hand, fluctuations in business have occasionally resulted in a situation in which certain merchant agents earned more than some exclusive agents (P. A. 26, 105, 194, 385, 401–402).

Generally, the merchant agents do not have any substantial investment in the express agency although those who are regularly engaged in another business sometimes use their business equipment, such as typewriter and vehicles, in express work (P. A. 117–125, 287, 289, 406–413). Petitioner supplies merchant agents with all forms, labels, tags, stationery, etc. and, where needed, also supplies and maintains scales, platform trucks, safe, desk, chair, chests of drawers, glue, metal stamp, and revolver (P. A. 118, 133–134, 144–145, 287, 311, 324, 369, 386, 442, 544, 548, 613; R. A. 91).

Merchant agents generally perform the office part of their express work in their business establishments or homes (P. A. 117, 119, 389, 515). They generally do not devote full working time to express business and petitioner does not specifically set working hours (P. A. 127; R. A. 4). Those otherwise in business usually do express work during regular business hours (P. A. 135–136; R. A. 32–33). However, express moves at all hours of the day and night and agents must meet trains, and load and unload shipments, at times determined by train schedules; if they fail to do so, they will lose their agencies (P. A. 120, 127–129, 136–137, 145–146, 761; R. A. 32–33).

Many of the conditions applicable to the work of merchant agents apply as well to other classes of petitioner's agents. Thus, the above arrangements for working hours also characterize the other non-exclusive commission agents and some exclusive agents, all of whom petitioner concedes to be employees (P. A. 444, 505, 613; R. A. 4). Similarly, all agents are expected to arrange for whatever assistance they need and pay for such help out of their commissions (P. A. 21, 37, 38, 42, 400, 488, 713–714, 817, 818; R. A. 23, 88, 91). While petitioner does not have any standard contract or employment agreement with its agents, all agents, whether merchant, joint, or salaried, complete petitioner's Form 100 "Application for Employment" (P. A. 27, 40, 41, 44; R. A. 91, 92). Merchant agents, and all other commission agents, are not on petitioner's payroll but deduct their commissions before remittance to the petitioner of express charges collected (P. A. 40; R. A. 29). Petitioner's relations with its merchant agents, as with its joint agents, can be terminated at any time by either side (P. A. 41, 44, 613). Merchant agents are, in fact, replaced if they cannot or will not perform essential functions, or if they will not follow instructions (P. A. 132–133, 455, 494; R. A. 8–9).

Moreover, express work is essentially the same whether it is done by an exclusive commission agent or a joint or merchant agent (P. A. 400, 453–454, 461; R. A. 4–5, 22–24). Agencies have often been changed or reclassified by petitioner, as from a merchant agency to a joint or exclusive commission agency or from joint to merchant agency; apparently, this can occur without any substantial change in the service rendered (P. A. 42, 61, 108 407, 467–468, 424–425; 495, 532; R. A. 4–7, 9–10, 93–94, 144–146). Petitioner's Official Directory lists all its express offices without distinguishing the category of the agency involved (R. A. 124–125, 128).

The similarity in petitioner's relations with its various agencies results from the fact that similar basic express services are performed at all agencies—*i. e.*, receiving out-going shipments from shippers and issuing receipts to them; making up waybills to control the transportation of these shipments to their destination; carrying the shipments, or transporting them by vehicle, to the railroad station platform; meeting trains and loading out-going shipments on them and unloading inbound shipments from them; delivering inbound shipments to the consignee at his address or at the agency office, and collecting transportation and C. O. D. charges; selling financial paper; making various regular reports and remittances of money to petitioner; maintaining a register of shipments; making out claims for lost or damaged shipments; and performing the pickup and delivery of express, or, where someone else performs this service, maintaining a call book of requests by customers for pickup and delivery (P. A. 33–34, 134–136, 265–266, 337–340, 415, 607; R. A. 32–33). As the record demonstrates, the nature of petitioner's nationwide service and the regulations imposed upon it as a common carrier require that it maintain uniform procedures and closely supervise all its agencies (P. A. 35, 132, 461, 504; R. A. 8, 21).

Agents, including merchant agents, are furnished with a copy of petitioner's "General Rules and Instructions" (P. A. 118, 442; R. A. 85–86). Petitioner has issued two editions of these rules, in 1936 and in 1948; earlier it had utilized the rules published by its predecessor and had issued supplements to them (P. A. 12, 657; R. A. 2, 19–20). The rules contain detailed instructions concerning the operation of the express business by agents, including the manner o completion of receipts and labels, waybills, and othe papers; observance of tariff schedules and collection of charges; the packing, loading, and safeguarding o shipments, with special rules for shipments of money handling of station trucks, scales, safes, and othe equipment; and the delivery of shipments includin requisite identification of consignees (P. A. 658–669)

All agents, including merchant agents, also receive petitioner's Form 95 "Special Instructions to Agents", containing detailed instructions with regard to the safekeeping of money and financial paper and their remittance to petitioner (P. A. 12–13, 500, 652–654; R. A. 92). They are also bound to follow petitioner's Circular No. 93–A, "General Accounting Instructions for Commission Office" (P. A. 525), and, in handling explosives, to observe pertinent I. C. C. regulations supplied them (P. A. 386–387). Periodically, various circulars and bulletins are sent to agents which often contain instructions with respect to the method of conducting business and admonitions that the rules and instructions must be observed (P. A. 139, 140, 268, 437, 517–518; R. A. 26–28, 31, 35–37, 40–79, 91). Finally, petitioner's Route Agents visit and inspect the various agencies, check upon the observance of petitioner's rules and regulations, and often give verbal instructions concerning the conduct of the business (P. A. 24, 25, 38, 44, 137, 497; R. A. 10, 31). A knowledge of the various rules and instructions is essential to the transaction of express business by all agents, including merchant agents, although some rules were not applicable at agencies whose business did not include specific operations (P. A. 20, 35, 118–119, 133, 137–138, 352, 658, 664–665; R. A. 8).[4]

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[4] The petitioner's "General Rules and Regulations" are preceded by a "Notice to Employees", which states (R. A. 19):

"The Rules, Instructions and Information contained herein are intended for the guidance and use of the Company's employes only. The business of the Company must be transacted strictly in accordance therewith.

C. ADMINISTRATIVE PROCEEDINGS

The administrative proceedings involved here represent the third time that the status of merchant agents has been considered by the Railroad Retirement Board. In 1937 the same question arose under the Retirement Act; at that time, petitioner contended that both "joint agents" and "merchant agents" were equally not covered. (P. A. 229; R. A. 11, 24.) The examiner's report (P. A. 45–97) recommended that joint agents and merchant agents be held to be "employees" under the Act and this conclusion was unanimously adopted by the Board on March 24, 1938 (P. A. 98–99). Upon petitioner's protest, the proceeding was reopened and additional evidence considered. In the second report, the examiner reached the same conclusion with respect to joint agents and merchant agents as classes; however, he believed that

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"Employes must make a thorough study of these Rules and Instructions. The plea of ignorance will not be accepted as excuse for mistakes made in transacting any part of the business.

"These Rules and Instructions are based on the character of forms and the conditions which prevail at the majority of offices. * * *"

The "majority of offices" referred to must mean the non-exclusive commission agencies (*supra*, p. 6).

Similarly, Rules 790 and 794 provide (P. A. 664–665):

"Rule 790. The local agent has jurisdiction over his office and its branches, and authority over employes within his jurisdiction.

"Rule 794. The Company's General Rules and Instructions appearing in this book and Supplements thereto, also Operating Department General Circulars, must be faithfully and uniformly observed in transacting the Company's business."

pickup and delivery service by merchant agents, and the status of individuals where a company was the nominal agent, should be determined according to the facts of the individual case (P. A. 161–199). On August 1, 1939, the Board again ruled as recommended by the examiner (P. A. 200–223).

Since the Board's first decision, petitioner paid railroad retirement taxes, and, after June 30, 1939, unemployment insurance contributions, under protest (P. A. 229–230, 589). In 1946, petitioner brought suit for refund of retirement taxes, after the Bureau of Internal Revenue disallowed its claim (P. A. 229–230, 589). In 1948, the Board again opened the administrative proceeding (P. A. 224–227) upon petitioner's demand for refund of unemployment insurance contributions paid with respect to joint agents, merchant agents, branch agents, and certain others (P. A. 589).

Extensive additional evidence was submitted (reproduced in part at P. A. 229–582; R. A. 89–138). The examiner then rendered his report, thoroughly discussing the law and the evidence, and set out findings of fact, conclusions of law, and recommendations (P. A. 583–804). He recommended, *inter alia*, that merchant agents and their assistants be considered to be "employees" and that petitioner's demand for refund be denied (P. A. 615).[5] After hearing argument (P. A. 804–840; R. A. 146–147), the Board, on August 29, 1956, adopted as its own the examiner's findings of fact, conclusions of law, and reasons therefor (P. A. 839–840).

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[5] The examiner similarly held with respect to joint agents, caretaker or custodian agents, and fixed allowance agents. On the other hand, the examiner concluded that limited (branch) agents were not employees and that the contributions with respect to them should be refunded (P. A. 615; see *supra*, p. 5).

D. THE DECISION BELOW

On petition for review (P. A. 841-848), the Court of Appeals for the Seventh Circuit unanimously upheld the decision of the Railroad Retirement Board (Pet. App. 24–32).

The court first reviewed the various administrative proceedings and the evidence concerning the character of merchant agents and their relations with petitioner. Relying upon the pertinent statutory provisions, the decisions of this Court, and those of the courts of appeals, it held that the administrative determination should not be set aside if it is "supported by substantial evidence, is not arbitrary and has a reasonable basis in law" (Pet. App. 29). It concluded that petitioner had been given every opportunity to present its case in three hearings and in arguments before the examiners and the Board.

It then held, applying the statutory definition, that a merchant agent is an employee "if * * * he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service", citing the provisions of the Railroad Retirement Act (45 U. S. C. 228a (b), (c)), the Railroad Unemployment Insurance Act (45 U. S. C. 351 (d),

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No opinion was expressed with respect to pickup and delivery service performed as part of a general drayage business conducted by an agent or his assistant (P. A. 615).

(e)), and the Railroad Retirement Tax Act (26 U. S. C. 3231 (b), (d)). This statutory definition, the court stated, must prevail if it differs from generally accepted common law tests (Pet. App. 30).

Returning to the evidence, the court ruled that the status of merchant agents was to "be determined on the basis of the entire situation" (Pet. App. 31). The court pointed out that the agents performed continuing express services as an integral, essential part of petitioner's nationwide service and that the nature of petitioner's business makes essential a supervising control of each agent. Referring to petitioner's rules and instructions and other supervisory activities, the court concluded that there was substantial evidence to support the Board's finding that merchant agents were petitioner's employees for the purpose of the Acts (Pet. App. 31).

ARGUMENT

In the decision unanimously upheld below, the Railroad Retirement Board determined, on the basis of detailed findings, that petitioner's merchant agents were its "employees" and hence were entitled to certain benefits. In making that determination, the Board applied a broad statutory criterion to a complex fact situation, after having for the third time held hearings and heard petitioner's evidence and arguments. The record amply supports the Board's conclusion, as the court below held. Moreover, contrary to petitioner's assertion, this case does not present any substantial issue as to the construction of the "employee" definition set forth in the Railroad Retirement and Unemployment Insurance Acts.

There is therefore no occasion for further review of the Board's determination.

1. (a) Under the Railroad Retirement and Unemployment Insurance Acts,[6] a person is an "employee" if he is "in the service" of an employer for compensation; and he is in such service—

> * * * if * * * he is *subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service,* or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations * * *. [Emphasis added.]

The Board is required to determine who is an employee and its findings of fact, "if supported by evidence and in the absence of fraud, shall be conclusive."[7]

In considering comparable administrative authority to ascertain "employee" status, this Court has repeatedly emphasized the deference due to such an administrative determination. "Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. * * * [W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. * * * [T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130–131; *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143, 153–154; *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 478. To the same effect, with respect to the Railroad Retirement Board, see *Southern Development Co.* v. *Railroad Retirement Board*, 243 F. 2d 351, 353 (C. A. 8); *Brotherhood of Railway and Steamship Clerks* v. *Railroad Retirement Board*, 239 F. 2d 37, 43 (C. A. D. C.).[8]

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[6] Section 1 (b), (c) of the Railroad Retirement Act, 45 U. S. C. 228a (b), (c); Section 3231 (b), (d) of the Internal Revenue Code of 1954 (Railroad Retirement Tax Act), 26 U. S. C. (Supp. V), 3231 (b), (d): Section 1 (d), (e) of the Railroad Unemployment Insurance Act, 45 U. S. C. 351 (d), (e).

[7] Sections 10 (b), 11 of the Railroad Retirement Act, 45 U. S. C. 228j (b), 228k; Sections 5 (c), (f) of the Railroad Unemployment Insurance Act, 45 U. S. C. 355 (c), (f).

(b) The record in the instant case and the examiner's exhaustive consideration of the evidence demonstrate, we believe, that the Board's decision was correct, and that petitioner's merchant agents are its "employees" since they were "subject to [its] continuing authority * * * to supervise and direct the manner of rendition of [their] service." In any event, it can scarcely be doubted that the Board determination has "'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, supra*, 322 U. S. at 131. The same result has now been reached after three administrative proceedings, and no contrary view has been expressed by any examiner, Board member, or reviewing judge. In the circumstances, since the Court of Appeals clearly has made a "fair assessment" of the evidence underlying the Board's decision, no reassessment by this Court is warranted. See, *e. g.*, *Federal Trade Commission* v. *Standard Oil Co.*, 355 U. S. 396. 401; *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502–503.

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[8] In a number of cases, courts of appeals have recognized their limited review function and have sustained the Board's finding with respect to employment relations in a specific situation or at a specific time. *Southern Development Co.* v. *Railroad Retirement Board*, *supra*; *Marmon* v. *Railroad Retirement Board*, 218 F. 2d 716 (C. A. 3); *Lane* v. *Railroad Retirement Board*, 185 F. 2d 819 (C. A. 6); *Dunne* v. *Railroad Retirement Board*, 183 F. 2d 366 (C. A. 7), certiorari denied, 340 U. S. 854; *Monahan* v. *Railroad Retirement Board*, 181 F. 2d 751 (C. A. 7); and *Ellers* v. *Railroad Retirement Board*, 132 F. 2d 636 (C. A. 2).

The substantial nature of the evidence supporting the Board's finding is indicated in our statement of facts (*supra*, pp. 2–11) and in the summation by the court below (Pet. App. 25–28, 31), and need not be repeated in detail. The merchant agents function as an integral part of petitioner's nationwide operations. Not only does the nature of petitioner's business make it essential that each agent's work be closely supervised and controlled by it, but there was ample evidence to show that petitioner actually exercised supervisory authority over them. Its detailed rules, instructions, and circulars extend to the minutiae of express business—merchant agents are told, for example, how to pull platform trucks and admonished not to slam the door of a safe (P. A. 666, 668).

Significantly, merchant agents are subject to the same kind of supervision and control which are applicable to salaried personnel and other commission agents whom petitioner admits are its employees (*supra*, pp. 8-11). The tenuousness of petitioner's arguments on the facts is demonstrated by its attempt to assert a distinction between merchant agents and joint agents, *i. e.*, the railroad station agents employed by petitioner (*supra*, pp. 3-4, 5). In the 1937 and 1938 hearings, petitioner argued vigorously that joint agents and merchant agents were similarly situated and that a decision with respect to one would extend to the other (R. A. 22-24). Now, petitioner concedes that joint agents are its employees, but urges that this concession is made only for the purpose of this proceeding and no conclusion can be drawn from it (Pet. 6, 21, n. 15). Quite clearly, however, petitioner's acquiescence with respect to joint agents was required by the numerous intervening decisions of the National Railroad Adjustment Board and the National Mediation Board dealing with joint agents as petitioner's employees (P. A. 677; R. A. 95-96). See also this Court's decision in *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 343, recognizing that such joint agents "primarily are employees of the railway and secondarily of the railway express agency." Merchant agents also are "primarily" interested in another business or in the occupation of housewife, student, etc. That this primary interest is not employment by the railroad or on railroad premises can hardly be of material distinction. For, as far as their express work is concerned, they submit to petitioner's authority in the same manner as joint agents; like joint agents, therefore, they are its employees for purposes of railroad retirement and unemployment insurance.

(c) While petitioner insists at one point that the "entire situation" must be considered (Pet. 22-23),[9] it inconsistently seeks to contest the Board's finding by reliance upon decisions (Pet. 19-20) arising under different statutes and dealing with totally different industries and relationships. These decisions, even apart from the difference in statutes, are readily distinguishable. In *Party Cab Co.* v. *United States*, 172 F. 2d 87, 92-93 (C. A. 7), and *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51, 55 (C. A. 6), the courts expressly stated that the companies' rules did not purport to control the manner in which the taxi drivers and the distributors conducted their independent business, but related only to limited matters of interest to the companies. Similarly, the insurance agent in *Zipser* v. *Ewing*, 197 F. 2d 728, 731 (C. A. 2), had received for general guidance a manual of rules and regulations, but, as the Second Circuit stressed, he was under no obligation to perform any services and his activity was entirely up to him. In *United States* v. *Silk,* 331 U. S. 704, the rules and regulations were more explicit but this Court pointed out that no attempt had been made actually to impose them upon the truckers; they were considered impractical and were ignored (pp. 710–711, 717, n. 11).

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[9] In this connection, petitioner contends that the Board failed to look at the "entire situation" and improperly "atomized" petitioner's relations with the merchant agents (Pet. 21-23). However, the examiner expressly reached his conclusion upon "all the foregoing circumstances" (P. A. 781). The examiner first stated his conclusion (P. A. 696) after generally discussing the facts; he then considered each of petitioner's contentions in relation to the whole situation; it is this analysis, prompted by petitioner's arguments, that petitioner criticizes. The Seventh Circuit recognized that the Board considered "all the activities of the merchant agents" (Pet. App. 31) and its opinion gives no basis for petitioner's statement that the court "rejected" the Board's approach (Pet. 22).

As to the other cases cited (Pet. 14–15), the alleged "employees" were themselves independently engaged to some extent in the same field of business as the alleged employer. Distinguishing between their interest as independent entrepreneurs and as employees could therefore be expected to present close questions. In the instant case, on the other hand, as the Board's examiner pointed out, none of petitioner's agents are in the express business (P. A. 755–759); some, such as housewives, students, etc., engage in no business whatsoever. The relation of all these persons to express work is solely as petitioner's agents. While they earn a commission, they do not act independently on the basis of their own initiative and judgment. For example, all incoming shipments come to them only as a result of petitioner's nationwide system. They must carefully observe petitioner's detailed rules and instructions governing every aspect of their work. A failure of care will be punished not by a loss of custom, typical of the entrepreneur, but by loss of the agency, a discharge typical of the employment situation.

One of the few other businesses in the country whose organization resembles petitioner's is the Western Union Telegraph Co., which also provides an integrated nationwide service with outlets in all parts of the country. In certain small towns, where the volume of business would not support full-time officers, Western Union made commission arrangements with agents, generally local businesses like hotels, drug stores, bus stations, or insurance offices. It furnished necessary equipment, imposed its detailed rules and regulations and supervised the agents through district superintendents and visiting representatives; an agency would be terminated if the rules were violated. When the question of coverage arose under the Fair Labor Standards Act, the court rejected the contention that these agents were independent contractors. Because of the control exercised by Western Union, it held that these "merchant agents" were its employees. *Western Union Tel. Co.* v. *McComb,* 165 F. 2d 65 (C. A. 6), certiorari denied, 333 U. S. 862.[10] A similar result was properly reached here.

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[10] The Sixth Circuit stated (165 F. 2d at 71):

"* * * the evidence in the instant case proves that the Western Union Telegraph Company controlled the methods and means used by its 9A agents in the transaction of the company's public service business.

"Certainly, workers in an agency office of the telegraph company are not withdrawn from coverage of the Fair Labor Standards Act for the reason that some of them are engaged in local retailing work in addition to telegraphic work, or because of the location of the telegraph office in a retail or service establishment. * * *"

Within the last few weeks, a district court has similarly decided that the merchant agents of the petitioner Railway Express Agency in the State of Maine are also "employees" for the purpose of the Fair Labor Standards Act. *Mitchell* v. *Railway Express Agency* (D. Me.), decided April 3, 1958, 34 Labor Cases 96,500, ¶71,434.

2. Contrary to petitioner's contentions (Pet. App. 11–15), the decision below does not present any general issue as to the standard to be applied in determining "employee" status under the railroad statutes.

In cases arising under the Social Security Act, National Labor Relations Act, and the Federal Employers Liability Act, this Court has been called upon to give authoritative guidance and to consider the applicability of common law master-servant criteria, since those statutes do not contain any definition of "employee".[11] See *United States* v. *Silk,* 331 U. S. 704, 711; *National Labor Relations Board* v. *Atkins & Co.,* 331 U. S. 398, 403; *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 120–121; *Hull* v. *Philadelphia & Reading Ry. Co.,* 252 U. S. 475, 480, 483. In contrast, as we have already noted (*supra,* pp. 16–17), Congress explicitly defined "employee" in the Acts here involved and thereby established the standard to be applied by the Board. Indeed, in *United States* v. *Silk, supra,* this Court distinguished the instant "carrier employment" from the Social Security situation, pointing to the express definition of employee in the Railroad Retirement Tax Act (331 U. S. at 711). And as stated in *Walling* v. *Portland Terminal Co.*, 330 U. S. 148, 150, which involved the Fair Labor Standards Act, a statutory definition supersedes common-law criteria and precludes analogies from other legislation.

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[11] It should be noted that, even under the statutes which left the term "employee" undefined, this Court has decisively rejected the use of common-law criteria, which petitioner urges here. Petitioner concedes this with respect to the Fair Labor Standards Act, the National Labor Relations Act, and the Social Security Act, but incorrectly states that common law tests were accepted under the Federal Employers Liability Act (Pet. 11, n. 5). Recent decisions of this Court reject the common-law master-servant rules under the F. E. L. A. *Sinkler* v. *Missouri Pacific R. Co.,* No. 133, this Term, decided April 28, 1958; *Kernan* v. *American Dredging Co.,* 355 U. S. 426, 431–432; *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500, 507–509.

In any event, even assuming that in certain situations a substantial question might exist as to the relevance of common-law rules under the railroad acts, this case does not present the question. As the Seventh Circuit stated, the only portion of the statutory definition here at issue is the characterization as an "employee" of any person "* * * subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service * * *" (Pet. App. 30–31). But this provision merely restates a principal element of the common-law rule (Restatement of the Law of Agency, Sec. 220), which has, in fact, been called a "control test". *Bartels* v. *Birmingham*, 332 U. S. 126, 129; *United States* v. *Silk*, 331 U. S. 704, 713; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 120, n. 19. In the instant case, the examiner's report noted that the quoted part of the statutory definition is not substantially different from the common-law standard, although in substitution therefor,[12] and he cited a number of relevant common-law cases in the course of his report (P. A. 627–628, 643–644, 750–759). The record, as previously indicated (*supra*, pp. 17–19), amply shows such control exercised by petitioner over the merchant agents as to satisfy the common-law employment criteria. Accordingly, since petitioner's merchant agents are its "employees," regardless of whether the statutory standard or a separate common-law test is applied, a decision as to the applicable standard is not required.[13]

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[12] A definitive statement by Congress was necessary because of the other elements in the statutory definition and because even with respect to control, as the court below stated, there is a considerable "contrariety of opinion" concerning the common law master-servant relation, and no single, accepted formula (Pet. App. 30). The confusion surrounding the

3. Finally, the holding below does not, as petitioner asserts (Pet. 15–17), represent a threat to the relationship between coverage under the Railroad Retirement Act and under the Social Security Act. This Court has recognized that the Acts have different standards for "employment" and that only the Railroad Retirement Act has an explicit definition. *United States* v. *Silk,* 331 U. S. at 711 (*supra,* pp. 23–24). The "complementary relationship" between the Acts does not depend upon an identity of standards, as petitioner assumes, but upon express statutory provisions in both Acts which exclude from the social security system all those covered by railroad retirement and thus give priority to the definition of

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common-law criteria was noted by this Court. See *United States* v. *Silk*, 331 U. S. at 713–714; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. at 120–121.

[13] The decision below does not imply that the result would have been different had a common-law test been utilized, as petitioner assumes (Pet. 12, 17–20). The court merely said that the statute must prevail "[i]f there is any real difference between the generally accepted common law tests and the statutory definition" (Pet. App. 30).

"employee" in the Railroad Retirement Act.[14] For that reason, no conflict or confusion can be anticipated as a result of this decision. Indeed, petitioner has been paying railroad retirement taxes for its merchant agents since the Board's rulings in 1938 and 1939; yet it fails to show, or even allege, any consequent difficulties during these past twenty years.

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[14] Section 17 of the Railroad Retirement Act, 45 U. S. C. 228q; Section 210 (a) (9) of the Social Security Act, 42 U. S. C. (Supp. V) 410 (a) (9). Moreover, while any specific work is covered only under one of the two Acts, it is also clear that a single employment relation might have coverage divided between Social Security and Railroad Retirement, depending upon the relation of separate items of work to the business of a carrier. *Adams* v. *Railroad Retirement Board*, 214 F. 2d 534 (C. A. 9). The examiner pointed out, citing the Board's Annual Report, that millions of persons had both railroad retirement coverage and social security employment, even in the same year (P. A. 763–765).

It would also be misleading to assume that exclusion of petitioner's merchant agents from railroad retirement would result in alternative coverage under the social security system (Pet. 15–16). Before 1950, the merchant agents would have had no coverage whatsoever, since social security did not then extend to self-employed independent contractors, as petitioner considers them. If petitioner's view were accepted, many of the merchant agents would even now remain outside both systems since their earnings from commissions are apparently too small to meet minimum Social Security requirements. (R. A. 39; 42 U. S. C. (Supp. V) 412, 413 (a) (2) (B).)

CONCLUSION

The decision below is essentially factual in nature. No conflict of decisions or general question of law is involved. Accordingly, it is respectfully submitted that the petition for certiorari should be denied.

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May 1958.

APPENDIX

STATUTES INVOLVED

The Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U. S. C. 228a–228y provides in part:

> SECTION 1b [45 U. S. C. 228a (b)].
>
> The term "employee" means (1) any individual in the service of one or more employers for compensation, * * *
>
> * * * * *
>
> SECTION 1e [45 U. S. C. 228a (e)].
>
> An individual is in the service of an employer whether his service is rendered within or without the United States if (i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and (ii) he renders such service for compensation, or a method of computing the monthly compensation for such service is provided in section 3 (c) of this Act. * * *
>
> SECTION 10 (b) [45 U. S. C. 228j (b)].
>
> 1. The Board shall have and exercise all the duties and powers necessary to administer this Act and the Railroad Retirement Act of 1935. The Board shall take such steps as may be necessary to enforce such Acts and make awards and certify payments. Decisions by the Board upon issues of law and fact relating to pensions, annuities, or death benefits shall not be subject to review by any other administrative or accounting officer, agent, or employee of the United States.

2. If the Board finds that an applicant is entitled to an annuity under the provisions of this Act or the Railroad Retirement Act of 1935 then the Board shall make an award fixing the amount of the annuity and shall certify the payment thereof as hereinafter provided; otherwise the application shall be denied.

3. The Board shall from time to time certify to the Secretary of the Treasury the name and address of each individual entitled to receive a payment, the amount of such payment, and the time at which it should be made, and the Secretary of the Treasury through the Fiscal Service of the Treasury Department, and prior to audit by the General Accounting Office, shall make payment in accordance with the certification by the Board.

4. The Board shall establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of such Acts, with power as a Board or through any member or designated subordinate thereof, to require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations in any matter involving annuities or other payments and shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities, and employ such individuals and provide for their compensation and expenses as may be necessary for the proper discharge of its functions. * * *

* * * * *

SECTION 11 [45 U. S. C. 228k].

Decisions of the Board determining the rights or liabilities of any person under this Act shall be subject to judicial review in the same manner, subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a de-

> termination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act except that the time within which proceedings for the review of a decision with respect to an annuity, pension, or lump-sum benefit may be commenced shall be one year after the decision will have been entered upon the records of the Board and communicated to the claimant.
>
> SECTION 17 [45 U. S. C. 228q].
>
> The term "employment", as defined in section 210 of title II of the Social Security Act, shall not include service performed by an individual as an employee as defined in section 1 (b).

The Railroad Retirement Tax Act (formerly the Carriers Taxing Act of 1937), 50 Stat. 437, as amended, 26 U. S. C. (Supp. V) 3201–3233, provides in part:

> 26 U. S. C. (Supp. V) 3231 (b).
>
> Employee.—For purposes of this chapter, the term "employee" means any individual in the service of one or more employers for compensation * * *.
>
> 26 U. S. C. (Supp. V) 3231 (d).
>
> Service.—For purposes of this chapter, an individual is in the service of an employer whether his service is rendered within or without the United States, if—
>
> (1) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and
>
> (2) he renders such service for compensation;

* * * * *

The Railroad Unemployment Insurance Act, 52 Stat. 1094, as amended, 45 U. S. C. 351–367 provides in part:

> SECTION 1 (d) [45 U. S. C. 351 (d)].
>
> The term "employee" (except when used in phrases establishing a different meaning) means any individual who is or has been (i) in the service of one or more employers for compensation, * * *
>
> * * * * *
>
> SECTION 1 (e) [45 U. S. C. 351 (e)].
>
> An individual is in the service of an employer whether his service is rendered within or without the United States if (i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and (ii) he renders such service for compensation * * *.
>
> SECTION 5 (c) [45 U. S. C. 355 (c)].
>
> * * * * *
>
> Any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the basis of his not being a qualified employee, and any claimant who contends that under an initial determination of his claim he has been awarded benefits at less than the proper rate, may appeal to the Board for the review of such determination. Thereupon the Board shall review the determination and for such review may designate one of its officers or employees to receive evidence and to report to the Board thereon together with recommendations. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly inter-

ested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the appeals provided for in this paragraph and for decisions upon such appeal.

In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this Act but which denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. The Board may also desigsnate one of its officers or employees to receive evidence and report to the Board whether or not any person or company is entitled to a refund of contributions or should be required to pay contributions under this Act, regardless of whether or not any claims for benefits will have been filed upon the basis of service in the employ of such person or company, and shall follow such procedure if contributions are assessed and payment is refused or payment is made and a refund claimed upon the basis that such person or company is or will not have been liable for such contributions. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the proceedings provided for in this paragraph and for decisions upon such proceedings.

* * * * *

SECTION 5 (f) [45 U. S. C. 355 (f)].

Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of Appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. Within fifteen days after receipt of service, or within such additional time as the court may allow, the Board shall certify and file with the court in which such petition has been filed a transcript of the record upon which the findings and decision complained of are based. Upon such filing the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjudication thereof over all other civil cases not otherwise entitled by law to precedence. It shall have power to enter upon the

> pleadings and transcript of the record a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court a transcript of the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.
>
> * * * * *

Section 210 (a) of the Social Security Act (49 Stat. 620) as amended, 42 U. S. C. (Supp. V) 410 (a) provides:

> The term "employment" * * * shall not include—
>
> * * * * *
>
> (9) Service performed by an individual as an employee or employee representative as defined in section 1532 of the Internal Revenue Code [26 U. S. C. (Supp. V) 3231];
>
> * * * * *

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IN THE

Supreme Court of the United States

October Term, 1957

No. 908

Railway Express Agency, Inc., *Petitioner*,

v.

Railroad Retirement Board, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, the Order of Railroad Telegraphers; and Railway Labor Executives' Association, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

OPPOSITION OF RESPONDENTS BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; THE ORDER OF RAILROAD TELEGRAPHERS; AND RAILWAY LABOR EXECUTIVES' ASSOCIATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

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RAILWAY EXPRESS AGENCY, INC., *Petitioner*,

v.

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS; AND RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Respondents*.

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The Respondents Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes; The Order of Railroad Telegraphers; and Railway Labor Executives' Association oppose the petition for a writ of certiorari and in support of their opposition concur in and adopt the views set forth in the Brief in Opposition filed by the Government in behalf of the Respondent Railroad Retirement Board.

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